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Supreme Court of the United States

October Term, 1975

EUGENE WILSON TYLER, Petitioner,

v.

TRAMMELL E. VICKERY, ET AL., Respondents

RALPH BANKS, JR., Petitioner

v.

TRAMMELL E. VICKERY, ET AL., Respondents.

JAMES E. C. PERRY, ET AL., Petitioners,

v.

EDWARD S. SELL, JR., ET AL., Respondents.

PETITON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RAY P. McCLAIN
ARMAND DERFNER
P.O. Box 608
Charleston, S. C. 29402

LAUGHLIN McDONALD
NEIL BRADLEY
52 Fairlie Street, N.W.
Atlanta, Georgia 30303

MELVIN L. WULF
E. RICHARD LARSON
22 East 40th Street
New York, N. Y. 10016

COUNSEL FOR PETITIONERS

OF COUNSEL:

JOHN H. RUFFIN, JR.
C.B. KING
THOMAS M. JACKSON
BOBBY L. HILL
MARVIN S. ARRINGTON
BENJAMIN SPAULDING
SARAJANE LOVE

INDEX

Page

Opinions Below 2
Jurisdiction 2
Questions Presented 2
Constitutional and Other Provisions Involved 3
Statement of the Case 4
Reasons for Granting the Writ 7
Conclusion 15

Appendix

Opinion of the United States Court of Appeals for the Fifth Circuit 1a

Order denying rehearing 23a

Opinion of the United States District Court for the Northern District of Georgia 24a

Opinion of the United States District Court for the Northern District of Georgia, certifying class. 33a

Opinion of the United States District Court for the Northern District of Georgia, Tyler v. Vickery 35a

Opinion of the United States District Court for the Northern District of Georgia, Banks v. Miller (Vickery). 44a

TABLE OF CITATIONS

Page

Cases:

Adickes v. S.H. Kress and Co., 398 U.S. 144 (1970) 14
Albemarle Paper Co. v. Moody, ___U.S.___, 45 L.Ed2d 280 (1975) 7, 8, 9, 10, 11
Alexander v. Louisiana, 405 U.S. 625 (1972) 13
Allen v. City of Mobile, 331 F. Supp. 1134 (S.D. Ala. 1971), aff'd per curiam, 466 F.2d 122 (5th Cir. 1972) 11
Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946) 13
Avery v. Georgia, 345 U.S. 559 (1953) 13
Baker v. Columbus Municipal Separate School District, 462 F.2d 1112 (5th Cir 1972) 10
Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Com'n, 482 F. 2d 1333 (2d Cir. 1973) 6, 10
Carter v. Gallagher, 452 F. 2d 315 (8th Cir. 1971) mod. 452 F. 2d 327 (1972)(En banc), cert. denied, 406 U.S. 950 (1972) 8
Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972) 8, 9, 10
Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972) 8, 9, 10
Coleman v. Alabama, 389 U.S. 22 (1967)(per curiam) 13
Dandridge v. Williams, 397 U.S. 471 (1970) 11
Davis v. Washington, 512 F.2d 956 (D.C. Cir.), cert. granted, ___U.S.___, 46 L.Ed.2d 37 (1975) 8
Douglas v. Hampton, 512 F.2d 976 (D.C. Cir. 1975) 5, 8, 9
Foster v. Sparks, 506 F.2d 805 (5th Cir. 1975) 13
Fuentes v. Shevin, 407 U.S. 67 (1972) 14, 15
Geduldig v. Aiello, 417 U.S. 484 (1974) 11
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) 11
Goss v. Lopez, 419 U.S. 565 (1975) 8, 14, 15
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 7, 8, 9
Hill v. Texas, 316 U.S. 400 (1942) 13
James v. Valtierra, 402 U.S. 137 (1971) 11
Jefferson v. Hackney, 406 U.S. 535 (1972) 11
Jones v. Georgia, 389 U.S. 24 (1967)(per curiam) 13
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 10
Norris v. Alabama, 294 U.S. 587 (1935) 13
Palmer v. Thompson, 403 U.S. 217 (1971) 13

Page

Police Department of the City of Chicago v. Mosley, 408 U.S. 92 (1972) 10
Poller v. Columbia Broadcasting Company, 368 U.S. 464 (1962) 13
Reed v. Reed, 404 U.S. 71 (1971) 10
Rogers v. International Paper Co., 510 F. 2d 1340 (8th Cir. 1975) 5
Sartor v. Arkansas National Gas Corp., 321 U.S. 620 (1944) 13
Schware v. Board of Examiners, 353 U.S. 232 (1957) 14
Snowden v. Hughes, 321 U.S. 1 (1943) 13
Swain v. Alabama, 380 U.S. 202 (1965) 13
Turner v. Fouche, 396 U.S. 346 (1970) 13
United States v. North Carolina, 400 F. Supp. 343 (E.D.N.C. 1975)(three-judge court) 10, 12
Walston v. County School Board, 492 F.2d 919 (4th Cir. 1974) 8, 9, 10

Constitutional Provisions:

Amendment V 8
Amendment XIV 3, 6, 9, 11, 14

Statutes:

United States Code

Title 28, Section 1254(1) 2
1331 4
1343 4

Title 42, Section 1981 4
1983 . . . . . .3, 4

Other Authorities:

American Psychological Association, Standards for Educational and Psychological Tests and Manuals (1974) 4, 11

Code of Federal Regulations, Title 29, Part 1607 10

Gunther, The Supreme Court, 1971 Term -- Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1 (1972) 10

Moore's Federal Practice, par. 56.15[4].....13

Supreme Court of the United States

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No. _____

EUGENE WILSON TYLER, *Petitioner,*

v.

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RALPH BANKS, JR., *Petitioner,*

v.

TRAMMELL E. VICKERY, JESSIE G. BOWLES, JAMES LANGFORD, EDWARD S. SELL, and T. HEYWARD VANN, *Respondents.*

JAMES E. C. PERRY, JACK LaSONDE, MARVIN NATHANIEL CLARK, BEN THOMAS COLE, JACQUELIN DIANNE BENNETT, MELVIN ROBINSON, RONALD STEWARD, MARVIN MANGHAM, JR., CECIL PACE, THOMAS F. BINGLEY, THULANT WALTER GCABSHE, JOSEPH ARRINGTON, OLIN L. ALEXIS and TIMOTHY SOLOMON, individually and on behalf of all others similarly situated and the NATIONAL BAR ASSOCIATION, INCORPORATED, *Petitioners,*

v.

EDWARD S. SELL, JR., T. HEYWARD VANN, TRAMMELL E. VICKERY, SCOTT S. EDWARDS, JR., and JESSIE G. BOWLES, individually and in their official capacities as Examiners of the Georgia State Board of Bar Examiners, BARBARA J. PRICE, THERON BURGESS, BEN P. AXSON, and HILLARY H. MANGUM, individually and in their offical capacities as Clerk of the Superior Court of Fulton, DeKalb, Chatham and Richmond Counties, Georgia, respectively, and as representatives of all other Clerks of Georgia Superior Courts similarly situated, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-styled cases.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in these consolidated cases is reported at 517 F.2d 1089 and is appended hereto at 1a. The denial of the petition for rehearing and suggestion for rehearing *en banc* is noted at 521 F.2d 814 and 815, and is appended hereto at 23a. The opinion of the United States District Court for the Northern District of Georgia is unreported and is appended hereto at 24a. The opinions of the district court defining the class, and granting partial summary judgment in *Tyler* v. *Vickery* and *Banks* v. *Miller (Vickery)* are also unreported and appended hereto at 33a, 35a and 44a, respectively.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on August 20, 1975. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on September 26, 1975. By order of Mr. Justice Powell, Circuit Justice, the time for petitioning for a writ of certiorari to review the judgment below was extended to and including January 20, 1976. This Court has jurisdiction to review the judgment below under 28 U. S. C.§1254(1).

QUESTIONS PRESENTED

1. Whether the equal protection clause of the fourteenth amendment to the constitution requires that a state-imposed occupational selection test that has a marked, undisputed adverse impact on minority applicants, be demonstrated to be related to job performance.

2. Whether it was error to grant summary judgment for respondents on the Court's bare conclusion that the test

"appeared" to relate to part of one aspect of job performance, where petitioners offered evidence that the respondents had not proved that the test was job-related in fact.

3. Whether evidence that the state officials had for many years excluded a disproportionately high percentage of black applicants for the bar, and had never investigated the reasons for this rate of exclusion, established a *prima facie* case of purposeful discrimination in violation of the equal protection clause of the fourteenth amendment, thus requiring a trial on the merits.

4. Whether the due process clause of the fourteenth amendment requires that an applicant be given an opportunity to challenge errors in the test score assigned to him.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

United States Constitution, Amendment Fourteen:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 42, Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

STATEMENT OF THE CASE

Petitioners brought these actions in the federal district court pursuant to 42 U.S.C. §§1981 and 1983, founding jurisdiction on 28 U.S.C.§§1331, 1343(3) and 1343(4). Each action challenged the practices of the bar examiners of the State of Georgia as racially discriminatory and arbitrary, in violation of the equal protection and due process clauses of the fourteenth amendment. One case, *Perry* v. *Sell*, was certified by the district court as a class action on behalf of all unsuccessful black applicants and all future black applicants. 33a. The district court granted respondents' motion for summary judgment in all of the consolidated cases. On appeal, a majority of the court of appeals affirmed the order granting summary judgment, one judge dissenting.

In evidence presented in opposition to the motion for summary judgment, petitioners showed that the Georgia bar examiners had, for many years, consistently failed a higher proportion of black applicants than white, including failing all forty-one black applicants on the July, 1972,exam;[1] therefore, petitioners argued, the bar examiners had a heavy burden of justification to support the use of a testing procedure that created, intentionally or unintentionally, such a markedly adverse impact on minority applicants. Petitioners argued that the respondents could meet their burden of justification only by reference to scientifically established methods of evaluating the relation of test scores to occupational performance. These scientific testing standards impose two principal requirements: (1) that a test, such as a bar examination, be demonstrated to be related to job perfromance, either by correlation of test scores with ratings of actual job performance (criterion-related validity, the preferred method), or by comparison of items and elements of the test with a comprehensive analysis of the elements of the job (content validity), and (2) that the passing score selected has a demonstrable relation to the purpose of the test.[2]

1. This group of applicants included graduates of the following law schools: Harvard (two), Yale (two), Emory (three), Columbia (one), Duke (one), University of Virginia (one), Notre Dame (one), and University of Georgia (one).

2. Some of these standards are set forth in Guidelines for employment testing issued by the Equal Employment Opportunity Commission, 29 C.F.R.§1607, and are described in more detail in American Psychological Association, Standards for Educational and Psychological Tests and Manuals (1974). See Albemarle Paper Co. v. Moody, ___U.S.___, 45 L.Ed2d 280, 304 n.29.

The testimony offered on the motion for summary judgment showed a sharp dispute on the issues of validity of the test. The bar examiners testified as to their testing procedures, and both petitioners and respondents presented expert witnesses to evaluate those procedures.[3] With respect to the job-relatedness of the test, expert witnesses for both petitioners and respondents agreed that a criterion-related analysis of the bar examination was feasible, although no such study has been done.[4] Respondents' expert witness testified that a bar examination should have "content validity."[5] Petitioners' expert witness testified that "criterion-related validity" (a more rigorous standard) ought to be demonstrated, and that the record in these cases does not even establish that the bar examination has "content validity." With respect to the passing score, all bar examiners testified that they set the passing score of "70" purely as a matter of judgment. Respondents' expert testified that judgment alone is not a satisfactory basis for setting a passing score. Petitioners' expert witness added (1) that an empirical study was necessary to establish that the passing score used was not racially discriminatory, and (2) that the passing score adopted by defendants represents a significantly different standard of performance from year to year. Respondents offered no reply to this expert testimony concerning the passing score.

Petitioners also contended that they had established a *prima facie* case of purposeful discrimination by the respondent bar examiners by showing, among other factors, that a disproportionate percentage of black applicants had been failed by the bar examiners for many years. Finally, petitioners asserted that

3. For discovery purposes, one expert witness for petitioners was deposed, and one expert witness for respondents was deposed. Petitioners' witness also filed two affidavits. The testimony referred to in this paragraph comes from those sources, and from the depositions of the respondent bar examiners.

4. Criterion-related test validation has generally been held, both professionally and judicially, to be the preferred method of showing job-relatedness. Douglas v. Hampton, 512 F.2d 976, 986 (D.C. Cir. 1975); Rogers v. International Paper Co., 510 F.2d 1340, 1349 (8th Cir. 1975).

5. An examination has "content validity" when "the behaviors demonstrated in testing constitute a representative sample of behaviors to be exhibited in a" job. "An employer cannot justify an employment test on grounds of content validity if he cannot demonstrate that the content universe includes all, or nearly all, important parts of the job." *A.P.A. Standards, supra* note 2, pp. 28, 29.

they were denied due process of law in that they had no opportunity for a hearing or review of any kind of the assignment of a failing grade to an applicant. Petitioners presented substantial evidence of arbitrariness in grading that supported the need for a hearing, including variation from year to year of the level of test achievement associated with a grade of "70", with no explanation by the bar examiners for such variations.

The majority of the court below rejected the principal contention of the petitioners – that the user of a test that produces discriminatory results must prove the job-relatedness of the test – and held that the equal protection clause of the Constitution requires nothing more than that an examination "test skills and knowledge which have a 'logical, apparent relationship' [not a demonstrated one] to those necessary" to the job. 14a, 517 F.2d at 1101.[6] All expert testimony was held to be, as a matter of law, irrelevant to evaluation of the constitutional claim. With respect to the issue of purposeful discrimination, the majority below held that direct proof of an opportunity to discriminate against black applicants was an essential element of petitioners' *prima facie* case. 5a, 517 F.2d at 1093. Although respondents conceded that the bar examiners' staff had information making possible the identification of applicants by race, the majority accepted the testimony of the examiners and of one member of their staff that the examiners never scrutinized this information until all grades were submitted. *Idem.* On the issue of procedural due process, the majority held that re-examination was a satisfactory substitute for a hearing. 16a, 517 F.2d at 1103.

Judge Adams, in dissent, appeared to adopt a standard of review more stringent than a bare "rational relation" test, yet less severe than requiring a showing of a compelling state interest for invidious discrimination resulting from unintentional conduct.[7] He concluded, 22a, 517 F.2d at 1108:

6. The majority asserted, incorrectly, that petitioners had conceded this proposition. Petitioners conceded, in their brief, only the limited proposition "that the bar examination does have a logical, apparent relationship to *some aspects* of legal knowledge, and legal knowledge is certainly *one* ingredient of practicing law." (Brief of Appellants, p. 23, emphasis supplied.)

7. This is the standard of review described in Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Com'n, 482 F.2d 1333, 1336-37 (2d Cir. 1973), cited in the dissenting opinion. 20a, 517 F.2d at 1106.

> Plaintiffs in this case have established what amounts to an exclusion from job opportunities of a disproportionate number of blacks. These facts call for a stricter standard of review that the standard the majority approves today. Of even more significance, in a case of this importance where one of the key factors in determining illegality will be the evaluation of motive, it seems particularly inappropriate to employ the device of summary judgment. Summary judgment may be used only when no genuine issues of fact remain unresolved.

The dissenting judge also thought that professional validation standards should be considered in evaluating the bar examination, 21a, 517 F.2d at 1107:

> The EEOC guidelines for employment testing and the principles enunciated in *Griggs* v. *Duke Power Co.*, – both of which require a validation of a suspect employment test – are at least persuasive as to the criteria to be applied to the Georgia bar examination under the facts of this case. As plaintiffs point out, the examination here, although not administered by an "employer" for the purpose of hiring, is for all practical purposes an employment test. The applicant who fails it may not, in any respect, be employed to practice law within the state.

The dissenter finally found that petitioners have proved a sufficient case of purposeful discrimination to avoid summary judgment. 20a, 517 F.2d at 1106.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the judgment below is in sharp conflict with the principles governing tests that control access to employment as announced in several opinions of this Court, *Albemarle Paper Co.* v. *Moody* __U.S. ___, 45 L.Ed.2d 280 (1975); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and as construed by all the five other courts

of appeals that have considered the issue.[1] The judgment below was particularly erroneous in applying decisions of this Court governing disposition of cases on a motion for summary judgment. The majority opinion also conflicted with decisions of this Court setting forth the circumstances in which hearings are required by due process of law, most recently expressed in *Goss* v. *Lopez*, 419 U.S. 565 (1975).

1. *Every other court construing the burden on a public agency, which uses a test shown to have an adverse impact on minority applicants, has adopted a heavier burden of justification than that used by the majority below.*

In recent years, this Court has twice set forth the standards of review against which discriminatory tests must be measured. In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), the Court held that if "an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. at 431. Specifically, the Court noted, a test user has "the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U.S. at 432.

Last Term, in *Albemarle Paper Co.* v. *Moody*, *supra*___ U.S.___, 45 L.Ed.2d at 304, the Court further refined the burden placed upon test users, stating

> "that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being tested.'"

1. Douglas v. Hampton, 512 F.2d 976 (D.C. Cir. 1975), Davis v. Washington, 512 F.2d 956 (D.C. Cir.), cert. granted.___U.S.___, 46 L.Ed.2d 37 (1975); Walston v. County School Board, 492 F.2d 919 (4th Cir. 1974); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) *mod.* 452 F.2d 327 (1972) (en banc), *cert. denied*, 406 U.S. 95 (1972). All these cases were noted by the majority below, which declined to follow them. 8a, n.6; 517 F.2d at 1096 n.6.

Although *Griggs* and *Albemarle* were decided under Title VII of the Civil Rights Act of 1964, the five courts of appeals which have resolved testing issues under the Fourteenth Amendment have all placed a similar if not more stringent burden upon test users.

Only the majority below, allowing an "apparent relationship" between test results and job performance, has refused to require a test user to prove the existence of a positive relationship between test results and job performance. The majority below recognized that the *Griggs* standard was applicable. 9a, 11a; 517 F.2d at 1097, 1099.

Petitioners submit, however that the *Griggs* standard was improperly applied here on summary judgment. Therefore, the judgment should be vacated and this case remanded for a trial on the merits, where the complicated questions of the proper standard for validating tests for access to professional employment may be explored in full.

There is a clear conflict among the circuit courts of appeal as to the proper standard of justification required of a public agency using an employment test that has a disproportionate, adverse effect on minority applicants, whether that effect be intentional or unintentional. With the exception of the case under review, the courts of appeals have uniformly required a *substantial* showing of the relationship between job performance and *both* the content of the test and the passing score on the test. In *Douglas* v. *Hampton*, 512 F.2d 976, 981 (D.C. Cir. 1975), the court of appeals declared that the Fifth Amendment required that the government, to meet the *Griggs* standard, "must meet the heavy burden of proving that the practice 'bear[s] a demonstrable relationship to successful performance for the jobs for which it was used.'" Similar language has been used by all the other courts of appeals: *Walston* v. *County School Board of Nansemond County*, 492 F.2d 919, 924 (4th Cir. 1974)(per Associate Justice Clark, retired)("clear and convincing evidence")(teachers); *Chance* v. *Board of Examiners*,, 458 F.2d 1167, 1176 (2d Cir. 1972) ("a heavy burden of justifying" examinations)(teachers); *Castro* v. *Beecher*, 459 F.2d 725, 732, 733 (lst Cir. 1972)(the employer must show "convincing facts establishing *** the substantial congruence of employment requirements to job

performance"). This Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 n.14 (1973), cited the *Chance* and *Castro* cases with approval. It is also clear that, even if the content of a professional examination is properly job-related, there must be a showing that the passing score is related accurately to professional competence. *United States* v. *State of North Carolina*, 400 F.Supp. 343, 350 (E.D.N.C. 1975)(three-judge court). See also *Walston* v. *County School Board of Nansemond County, supra,* 492 F.2d at 925; *Baker* v. *Columbus Municipal Separate School District*, 462 F.2d 1112, 1114 (5th Cir. 1972).[2]

The question, in terms of equal protection analysis, "is whether there is an appropriate governmental interest suitably furthered" by the action creating the classification. *Police Department of the City of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972). Petitioners submit simply that the state must demonstrate a "fair and substantial" relationship between the test, as administered, and performance in the job for which the test is a requirement, *Reed* v. *Reed*, 404 U.S. 71 (1971).[3] The state does not meet this standard by showing no more than "a logical, apparent relationship to some aspects" of one part of the job. Users of tests with an adverse impact on minority groups bear a more strict burden of justification under the constitution. Cf. *Bridgeport Guardians, Inc.* v. *Members of Bridgeport Civil Service Com'n*, 482 F.2d 1333, 1336-37 (2d Cir. 1973).

The courts have uniformly recognized, as did this Court in *Albemarle Paper Co.* v. *Moody, supra,* ____U.S. at____, 45 L.Ed.2d at 304, that there are "professionally acceptable methods" for the evaluation of occupational selection tests. Where there exist such accepted scientific methods for test evaluation, the state is required to present evidence from this scientific community to establish a "fair and substantial relationship" between the testing instrument and the occupational

2. These three cases all involved misuse of the National Teacher Examinations prepared by the Educational Testing Service.

3. For a discussion of some of this Court's decisions requiring substantial relation between the means adopted by the state and the state's asserted purposes, see Gunther, *The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1(1972).

performance.[4] There are a number of reasons why the state must have more of a burden than an "appearance" of a relationship between test and occupational performance. First and most important, is the fact that a test that "appears" related to the requirements of a job often is not in fact related to job performance.

> "So-called 'face' validity, the mere appearance of validity, is not an acceptable basis for interpretative inferences from test scores."
>
> * * * * * *
>
> "The writing of items in terms used in a particular job. . . may give an appearance of relevance while contributing nothing to content validity, or indeed any useful validity information."[5]

This approach of "face" validity has been uniformly rejected in the testing profession and has never before been accepted by any court; yet the majority below adopted this as the yardstick by which the Fourteenth Amendment measures occupational tests.[6] Second, as a matter of policy, to establish radically different standards for evaluating state licensing tests

4. The presence of scientific, professionally accepted methods for evaluating the tests whose administration is producing a marked adverse result for black applicants is an important factor distinguishing this case from cases of "minimal scrutiny" relied upon by the majority below. This is not a case where the adverse classification is the result of political action resolving the conflicting claims of a "myriad of potential recipients," such as Jefferson v. Hackney, 406 U.S. 535 (1972); Geduldig v. Aiello, 417 U.S. 484 (1974); or Dandridge v. Williams, 397 U.S. 471 (1970). Nor is this a case where the democratic political process itself competes with the claim of invidious discrimination, as in James v. Valtierra, 402 U.S. 137 (1971). In such cases, the courts are asked to balance competing political claims. In the instant case, by contrast, the burden of judicial review is relatively narrow and well-defined, and the courts are becoming increasingly familiar with the relevant techniques.

5. American Psychological Association, Standards for Educational and Psychological Tests (1974), pp. 26, 29; cf. Albemarle Paper Co. v. Moody, *supra*,____U.S. at____, 45 L.Ed.2d at 304n.29.

6. Even in Allen v. City of Mobile, 331 F. Supp. 1134, 1141 (S.D. Ala. 1971), aff'd per curiam, 466 F.2d 122 (5th Cir. 1972), on which the majority below relied, "face" validity was not accepted. There, the test user had offered expert testimony that the test in question had "content validity." It is doubtful that summary judgment would have been granted on the record in these cases if respondents were anyone but lawyers and bar examiners. See Goldfarb v. Virginia State Bar, 421 U.S. 773, 787, 788 (1975), rejecting the contention that the legal profession is immune from anti-trust regulation.

used indirectly by public and private employers would be to invite a shift in discriminatory testing from the hiring stage to the licensing stage in occupational selection. Third, it is clearly established, both as a matter of professional opinion and of judicial opinion, that even when a test is job-related, the test user must additionally demonstrate that the passing score is suitably related to the purpose of the test. *United States* v. *State of North Carolina*, 400 F.Supp. 343, 350 (E.D.N.C. 1975) (three judge court). The court here simply found that the questions on the test appeared to relate to knowledge required of lawyers, and gave no consideration whatever to the manner in which the passing score was set. 30a-32a, 36a-37a, 46a-47a.

It was particularly inappropriate to grant summary judgment to the respondent bar examiners. Expert witnesses for both sides testified that, as a professional matter, the bar examination should have scientifically established validity in relation to the job of a practicing attorney. Petitioners' witness unequivocally testified that validity was not established on the record here. All expert witnesses criticized the manner in which respondents set their passing score. The district court never considered the question of the passing score in any of its opinions. The majority below undertook, for the first time on appeal, to resolve this question in favor of the bar examiners' untested judgment, in contradiction to the testimony of the expert witnesses for both parties. 15a, 517 F.2d at 1102. On this record, the job-relatedness of the test as adminsitered and of the passing score could not be resolved on summary judgment.

2. *Summary judgment should not have been granted on the basis of respondents' testimony in rebuttal to petitoners'* prima facie *case of purposeful discrimination.*

The decision of the majority below also conflicts with this Court's decisions concerning both (1) the necessary elements to make out a *prima facie* case of intentional discrimination, and (2) the rebuttal necessary to negate all issues of material fact on summary judgment. The majority below required proof of opportunity to discriminate; it did not

dispute that all other necessary elements were proved by petitioners. Many of this Court's decisions as to proof of a *prima facie* case of purposeful discrimination by administrative officials have discussed the factor of opportunity. See, e.g., *Alexander* v. *Louisiana*, 405 U.S. 625, 630-32 (1972), and cases there cited. These cases typically rested on a showing of statistical discrimination as to the selection of a single jury venire, plus an opportunity to discriminate. When the statistical evidence of discrimination has been consistent over a long period of time, however, this Court has never required proof of opportunity as a necessary element of a *prima facie* case of racially discriminatory conduct. See *Swain* v. *Alabama*, 380 U.S. 202, 205-209 (1965), as discussed in *Foster* v. *Sparks*, 506 F.2d 805, 829 (5th Cir. 1975). See also *Turner* v. *Fouche*, 396 U.S. 346, 360 (1970); *Jones* v. *Georgia*, 380 U.S. 24, 25 (1967) *(per curiam)*; *Coleman* v *Alabama*, 389 U.S. 22, 23 (1967) *(per curiam)*; *Avery* v. *Georgia*, 345 U.S. 559, 562-63 (1953); *Patton* v. *Mississippi*, 332 U.S. 463, 468-69 (1947); *Snowden* v. *Hughes*, 321 U.S. 1, 8-9 (1943); *Hill* v *Texas*, 316 U.S. 400, 405-06 (1942); *Norris* v. *Alabama*, 294 U.S. 587, 594-96, 598 (1935).

There are three additional reasons that summary judgment as to purposeful discrimination was not available to defendants on this record. First, under this Court's decision in *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 473 (1962), as the dissenting judge below noted, the importance of evaluating the motive of witnesses on the question of purposeful discrimination makes summary judgment inappropriate.[7] Second, summary judgment is a particularly inappropriate method for evaluating the credibility of witnesses. *Sartor* v. *Arkansas National Gas Corp.*, 321 U.S. 620, 628-29 (1944); *Arnstein* v. *Porter*, 154 F.2d 464, 469-72 (2d Cir. 1946). Since the plaintiffs had established the necessary elements of their case without defendants' testimony, defendants' testimony, even where uncontradicted and unimpeached, was not entitled to unquestioned belief on a motion for summary judgment. Cf. 6 Moore's *Federal Practice* par. 15[4], text at n.53. Third,

7. The majority below cited Palmer v. Thompson, 403 U.S. 217 (1971), for the proposition that motive is not relevant if opportunity to discriminate is not proved. *Palmer* is inapposite, however, since it held that motive is not relevant when there is no disproportionate adverse impact. In these cases, the adverse impact upon the plaintiffs and their class is undisputed.

the majority below held that the examiners' opportunity to learn the identity of candidates was conclusively precluded by the testimony of the examiners and one of the employees of the Board of Bar Examiners. The information identifying applicants is, for much of the relevant time, in the hands of other agents of the Board of Bar Examiners who presented no testimony in any form before the district court; furthermore, the examiners conceded that they had examined this information after grading papers. Since not all possible witnesses had testified that respondents had no opportunity to learn the identity of applicants, respondents were not entitled to summary judgment. *Adickes* v. *S. H. Kress and Co.*, 398 U.S. 144, 157-58 (1970).

3. *Due process of law is not satisfied by reexamination, with no opportunity for a hearing to challenge errors.*

As the majority in the court of appeals recognized, this Court has held that due process definitely applies to admission to the bar [17a, 517 F.2d at 1103]:

> "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware* v. *Board of Examiners*, 353 U.S. 232, 238-39 (1957).

In a long line of cases, most recently culminating in *Goss* v. *Lopez*, 419 U.S. 565 (1975), this court has held that due process of law requires "some form of notice and hearing - formal or informal". *Fuentes* v. *Shevin*, 407 U.S. 67, 90n.21.

> "[A]s long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause."

* * * *

> "...the length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, 'is not decisive of the basic right' to a hearing of some kind. *Fuentes* v. *Shevin*, 407 U.S. 67, 86 (1972)." [419 U.S. at 576.]

The *Goss* case held that when a student was suspended from public school for a period of ten days or less he has the right to a hearing, albeit somewhat less formal than in most contexts. The majority below held that a delay of six months or more to an applicant who is improperly failed on the bar examination, does not invoke the right to a hearing. It is difficult to imagine a deprivation that is more clearly *not de minimis* than the denial of the right to practice for six months or more a profession for which one has studied long years. The decision below is thus squarely in conflict with *Goss*, and the long line of cases cited therein.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorai to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

RAY P. McCLAIN
ARMAND DERFNER
P.O. Box 608
Charleston, S. C. 29402

LAUGHLIN McDONALD
NEIL BRADLEY
52 Fairlie Street, N.W.
Atlanta, Georgia 30303

MELVIN L. WULF
E. RICHARD LARSON
22 East 40th Street
New York, N. Y. 10016

COUNSEL FOR PETITIONERS

OF COUNSEL:

JOHN H. RUFFIN, JR.
C.B. KING
THOMAS M. JACKSON
BOBBY L. HILL
MARVIN S. ARRINGTON
BENJAMIN SPAULDING
SARAJANE LOVE

Eugene W. TYLER, Plaintiff-Appellant,

v.

Trammell E. VICKERY et al., Defendants-Appellees.

Ralph BANKS, Jr., Plaintiff-Appellant,

v.

Trammell E. VICKERY et al., Defendants-Appellees.

James E. C. PERRY et al., Plaintiffs-Appellants,

v.

Edward S. SELL, Jr., et al., Defendants-Appellees.

No. 74-3413.

United States Court of Appeals, Fifth Circuit.

Aug. 20, 1975.

A class action was instituted on behalf of all black persons who had taken and failed the Georgia bar examination, contending that the examination was unconstitutional on due process and equal protection grounds. The United States District Court for the Northern District of Georgia, at Atlanta, William C. O'Kelley, J., granted summary judgment holding the examination constitutional, and plaintiffs appealed. The Court of Appeals, Dyer, Circuit Judge, held, inter alia, that the bar examination was not intentionally discriminatory, that it was not inherently discriminatory by virtue of the disproportionate number of black applicants for admission to the bar who failed it, and that the failure to provide any procedure for review of a failing grade at the behest of the examinee did not constitute a denial of due process of law.

Affirmed.

Adams, Circuit Judge, dissented and filed opinion.

1. Federal Civil Procedure ⇐2481

In view of undisputed evidence of anonymity of grading process, allegations in class action brought on behalf of all black persons who had taken and failed the Georgia bar examination, to effect that bar examiners utilized examination as device to purposefully discriminate against prospective black attorneys on basis of race, presented no genuine issue of material fact which would require trial, and summary judgment was therefore properly entered against plaintiffs. U.S.C.A.Const. Amend. 14; Fed. Rules Civ.Proc. rule 56(c), 28 U.S.C.A.

2. Constitutional Law ⇐208(1)

Discriminatory motivation, even if proved, is not in itself a constitutional violation, and becomes so only when it is given opportunity to manifest itself in discriminatory conduct. U.S.C.A.Const. Amend. 14.

3. Federal Civil Procedure ⇐2470.2

In opposing motion for summary judgment, party is entitled not only to have facts viewed in light most favorable to it but also to all reasonable inferences which may be drawn from these facts; inferences nonmoving party seeks to draw, however, must be reasonable. Fed.Rules Civ.Proc. rule 56(c), 28 U.S.C.A.

4. Federal Civil Procedure ⇐2481

In suit in which plaintiff contended, inter alia, that Georgia bar examiners utilized bar examination as device to purposefully discriminate against prospective black attorneys on basis of race,

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INDEXED

inference that use by black applicants of "Black English" idiom presented viable opportunity for examiners to engage in overt racial discrimination against blacks was unreasonable as matter of law and therefore insufficient basis upon which to deny motion for summary judgment against plaintiffs. Fed.Rules Civ.Proc. rule 56(c), 28 U.S.C.A.

5. Federal Civil Procedure ⇐2470.2

In determining, for purposes of considering motion for summary judgment, whether factual inference which party seeks to draw is a reasonable one, court need not ignore existence of other evidence of record which tends to make that inference more or less plausible. Fed.Rules Civ.Proc. rule 56(c, e, f), 28 U.S.C.A.

6. Constitutional Law ⇐215

Traditional equal protection analysis, not standards developed by Equal Employment Opportunity Commission for employment testing covered by title VI of Civil Rights Act of 1964, was proper standard for judging allegations that Georgia bar examination inherently denied equal protection of the law to black applicants because of much greater rate at which they failed examination; there was therefore no basis for a holding that bar examination was required to be professionally validated or that bar examiners were required to demonstrate unavailability of alternative means of measuring professional competence. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; U.S.C.A.Const. Amend. 14.

7. Constitutional Law ⇐208(1)

Hallmark of rational classification is not merely that it differentiates, but that it does so on basis having fair and substantial relationship to purposes of classification. U.S.C.A.Const. Amend. 14.

8. Constitutional Law ⇐215

"Rational relationship" test was properly applied to judge contention that Georgia bar examination inherently denied equal protection of law to black applicants because of greater rate at which they failed examination, despite contention that "compelling state interest" test was proper because disproportionate passing rate of black and white applicants on examination served to create suspect classification based on race such as is needed to trigger strict judicial scrutiny. U.S.C.A.Const. Amend. 14.

9. Constitutional Law ⇐215

Otherwise legitimate classification does not become constitutionally suspect merely because greater number of racial minority fall in group disadvantaged by classification. U.S.C.A.Const. Amend. 14.

10. Civil Rights ⇐13.13(3)

Statistical evidence of disparate racial impact alone may establish prima facie case of racial discrimination, shifting to defendant burden of demonstrating that invidious discrimination was not among reasons for his action.

11. Attorney and Client ⇐4

State has legitimate and substantial interest in excluding from practice of law those persons who do not meet its standard of minimal competence.

12. Attorney and Client ⇐6

Georgia bar examination tests skills and knowledge which have logical, apparent relationship to those necessary in practice of law.

13. Constitutional Law ⇐208(1)

While party defending classification subject to strict judicial scrutiny must demonstrate that state has no other

available alternative which impinges less on protected interest involved, focus of rational relationship test is not whether state has superior means available to accomplish its objectives, but whether means it has chosen is reasonable one. U.S.C.A.Const. Amend. 14.

14. Attorney and Client ⇐6

Georgia bar examination was not irrationally administered because its outcome depended heavily on subjective grading judgments of examiners.

15. Federal Civil Procedure ⇐2481

In action in which plaintiffs alleged that Georgia state bar examination illegally discriminated against blacks, arguments that examiners should uniformly be required to use model answers and predetermined standards in grading were merely suggestions for improvement and did not raise fact issue as to whether examination itself was rational. Fed.Rules Civ.Proc. rule 56, 28 U.S.C.A.

16. Attorney and Client ⇐6

In proceeding in which plaintiffs contended that Georgia state bar examination works to discriminate against blacks, irrationality of examination was not shown by practice of board of law examiners in the grading failing papers falling close to passing mark or in comparing examination results with law school records as informal check of examiners' performance.

17. Attorney and Client ⇐6

It was not irrational for law examiners to compare results of bar examination with law school records as one informal, after-the-fact means of judging quality of examination.

18. Attorney and Client ⇐6

Georgia bar examination had rational relationship to applicant's fitness to practice law and was not inherently discriminatory against blacks by virtue of mere fact that examination was failed by much higher percentage of black than whites. U.S.C.A.Const. Amend. 14.

19. Constitutional Law ⇐287

Primarily because unqualified right to retake examination at its next regularly scheduled administration both satisfied purpose of hearing and afforded its protection, black applicants for admission to practice of law were not denied due process by virtue of fact that they were denied any procedure for review of failing grade in bar examination. U.S.C.A. Const. Amend. 14.

20. Constitutional Law ⇐305(2)

While opportunity to be heard is generally considered fundamental component of due process, entitlement to rehearing does not automatically flow from finding that procedural due process is applicable. U.S.C.A.Const. Amend. 14.

21. Constitutional Law ⇐251

Whether due process requires particular procedure in given situation must be determined by balancing individual's interest in avoiding loss which lack of procedure inflicts upon him against interest which government seeks to advance by denying it. U.S.C.A.Const. Amend. 14.

Appeals from the United States District Court for the Northern District of Georgia.

Before GEWIN, DYER and ADAMS,* Circuit Judges.

DYER, Circuit Judge:

This appeal presents a broad-based challenge to the constitutionality of the

* Of the Third Circuit, sitting by designation.

Georgia bar examination on due process and equal protection grounds. This suit before us, which has been certified by the district court as a class action on behalf of all black persons who have taken and failed the Georgia bar examination and have not been admitted to the practice of law in Georgia, as well as all black persons who will take the examination in the future, results from the consolidation of several suits brought by black individuals who have been unsuccesaful on the examination.

Summarized briefly, the Georgia bar examination is a two-day test administered biannually by the Georgia State Board of Bar Examiners (the Board), a group of five practicing lawyers appointed by the Georgia Supreme Court. Since February, 1972, the examination has been composed one-half of essay questions prepared and graded by the bar examiners, and one-half of the multiple choice Multistate Bar Examination (MBE), prepared and graded by the National Conference of Bar Examiners (NCBE), and administered simultaneously to bar examinees in a majority of states. Following grading, the scores on the essay and MBE portions of the examination are combined into a final grade according to one of three formulas recommended by the NCBE and selected by the Board. It has also been the practice of the Board, prior to final certification of the examination results, to convene and regrade failing papers which meet certain criteria such as falling close to the minimum passing score of 70, receiving a passing grade from a certain minimum number of examiners, or being recommended for regrading by an examiner. As a result of this reconsideration, a previously failing grade is on occasion raised to a passing score. No other review of a grade is provided.

The central focus of this litigation clearly is that black applicants as a class have traditionally experienced particular difficulty in passing the Georgia bar examination. This unfortunate situation reached a nadir in July, 1972, when each of the 40 black applicants taking the examination failed. On the February and July, 1973, examinations, slightly more than one-half the black applicants were unsuccessful, as compared to a failure rate of roughly one-fourth to one-third among white examinees.

Appellants' challenges to the constitutionality of the bar examination fall into three major areas. They claim: 1) that the examiners have used the bar examination to purposefully discriminate against black applicants on the basis of race; 2) that the bar examination inherently violates the fourteenth amendment's equal protection clause because of the highly disparate passing rates of black and white applicants; and 3) that the examination violates due process because there is no procedure for review of a failing grade.

Following extensive discovery by both sides which lasted several months, the district court granted summary judgment to appellees on each of these claims. After careful consideration of the record, we conclude that that court was correct in holding that there were no genuine issues of material fact to be resolved and that appellees were entitled to judgment as a matter of law. We therefore affirm its judgment.

I. INTENTIONAL DISCRIMINATION

[1] Appellants' first major contention is that the bar examiners utilize the examination as a device to purposefully discriminate against prospective black attorneys on the basis of race. The district court found this allegation to be

"totally without factual foundation," and hence appropriate for summary disposition. We agree that it presents no genuine issue of material fact which would require a trial.

[2] In so holding, we are mindful of the Supreme Court's admonition that "summary procedures should be used sparingly . . . where motive and intent play leading roles." Poller v. Columbia Broadcasting System, 1962, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458. However, discriminatory motivation, even if proved, is not in itself a constitutional violation, Palmer v. Thompson, 1971, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438, and becomes so only when given the opportunity to manifest itself in discriminatory conduct. Accordingly, appellees undertook to negate the materiality of intent as an issue of fact in this case not merely by denying racial animus but also by affirmatively demonstrating their inability to discover an applicant's race before grading had been completed.

The bulk of the evidence on this point was introduced through the deposition of Estes, an employee of the Georgia Supreme Court serving as Administrative Assistant to the Board, and the official primarily responsible for implementing the procedures designed to insure anonymity in the grading process. The substance of Estes' testimony was that while applicants are seated alphabetically and identified by name cards in the examination room, examination papers are identified and graded by number only. These numbers are drawn at random on individual cards by the applicants, who write their names on the cards and place them in sealed envelopes. These envelopes are then collected, sealed in a container in the examination room, and kept in the container in his custody throughout the grading process.[1] This testimony, which was uncontradicted,[2] was sufficient to show the absence of any genuine issue of material fact as to the examiners' direct access to information concerning an examinee's race during grading. *Fed.R.Civ.P.* 56(c).

Despite the examiners' inability to directly discover an applicant's race, appellants contend that a fact issue regarding intentional racial discrimination is inferentially raised by the deposition of Dr. J. L. Dillard, linguist and author of *Black English: Its History and Usage in the United States* (1972). According to Dr. Dillard, many black persons tend to speak an English variant, characterized by structures such as the pre-verbal use of "been", which has been coined Black English. While all formal education, and in particular that at predominantly black institutions, attempts to inculcate Standard English usage rather Black English, Dr. Dillard opined that a person

1. It was Estes' practice to open the container and begin matching names and numbers while the examiners were engaged in regrading. This matching was limited solely to numbers which the examiners had previously certified as having passed the examination; none of those not certified as passing were matched, whether the examination paper was being regraded or not. Moreover, the examiners were not notified of the status of any examinee until a decision had been reached on all papers.

2. Appellants attempted to counter this testimony with, for example, evidence that the "A" envelopes in which names and numbers were sealed were not completely opaque. But this evidence in no way speaks to the fact that the "A" envelopes were placed in another sealed container in the examination room. Thus, any person wishing to look into these envelopes for discriminatory purposes would have to examine them individually in the examination room, in full view of Board officials, exam monitors, and the examinees.

who had spoken this dialect during his youth might revert to it under situations of extreme time pressure, such as during a bar examination. From this testimony appellants wish us to draw the twin factual inferences that black applicants utilized a 1) unique and 2) recognizable writing style on the examination, providing the bar examiners with the opportunity to intentionally discriminate against black examinees, and hence raising a fact issue as to whether they had actually done so.

[3] In opposing a motion for summary judgment, a party is entitled not only to have the facts viewed in the light most favorable to it but also to all reasonable inferences which may be drawn from these facts. Harvey v. Great Atlantic & Pacific Tea Co., 5 Cir. 1968, 388 F.2d 123, 124–25; Liberty Leasing Co. v. Hillsum Sales Corp., 5 Cir. 1967, 380 F.2d 1013, 1014–15. The inferences the nonmoving party seeks to draw, however, must be "reasonable," and it is in this respect that we find Dr. Dillard's deposition insufficient to controvert appellees' properly supported motion for summary judgment.

[4] A major reason is that the deposition itself directly contradicts both inferences appellants would have us draw from it. In response to questioning by appellees' counsel regarding the racial uniqueness of Black English, Dr. Dillard testified that the incidence of the dialect was not limited to blacks, but was, in his words, "a major factor that differentiates so-called Southern dialect." He specifically testified that some southern whites would use similar or identical grammatical construction and that for those whites who had learned this patois in their youths, "[t]he trends of reversion are the same, of course." On the issue of the dialect's racial recognizability, Dr. Dillard testified that it was highly unlikely that an individual untrained in linguistics would recognize the use of Black English as a "black" characteristic, or indeed as anything other than incorrect standard English.[3] Both of these observations, which are in direct contradiction to the use of Dr. Dillard's linguistic theories which appellants wish to make in this lawsuit, in our view render the inference that Black English presents a viable opportunity for the Board to engage in overt racial discrimination unreasonable as a matter of law.

[5] Two other factors support this conclusion. First, in determining whether a factual inference a party seeks to draw is a reasonable one, we need not ignore the existence of other evidence of record which tends to make that inference more or less plausible. First Nationl Bank v. Cities Service Co., 1968, 391 U.S. 253, 284–86, 88 S.Ct. 1575, 20 L.Ed.2d 569. Here, such relevant record evidence is the MBE, which has comprised one-half of the Georgia bar examination since February, 1972. The significance of the MBE, as a multiple choice test, is that its scores are immune to any variation arising from the use of Black English.[4] After perusing the

3. Appellants also contend that Black English may result in overt discrimination even if the examiner does not recognize its use as a racial characteristic but merely reacts negatively because he conceives it to be incorrect. As this claim is equally susceptible to all of the other reasons we cite for concluding that no material issue of fact exists on this claim, we need not address ourselves to its intrinsic merits.

4. Dr. Dillard specifically testified that a background in Black English would have no adverse effect on an educated individual's comprehension of even very difficult standard English.

MBE results, the district court observed that on the July, 1972 examination, when each of the 40 black applicants failed, only one passed the MBE but failed the examination as a whole. It also noted that the results on subsequent examinations were comparable and that the director of testing of the NCBE had testified that it would be impossible for a state board of examiners to set the cutoff score so as to intentionally achieve this result. Obviously, these facts also tend to seriously undercut the inference that the difficulty of black applicants on the examination is due to language bias arising from the use of Black English. In the words of the Supreme Court in *First National, supra*, they "conclusively show that the facts upon which [appellants relied] to support [their] allegation were not susceptible of the interpretation which [they] sought to give them." 391 U.S. at 289, 88 S.Ct. at 1593.

Finally, this is not a case where the substitution of speculative inferences for the "specific facts showing that there is a genuine issue for trial" demanded by Rule 56(e) is to be treated indulgently. *See* Smith v. Local 25, Sheet Metal Workers, 5 Cir. 1974, 500 F.2d 741, 749. *Fed.R.Civ.P.* 56(f) requires that a party unable to show facts essential to his opposition present to the court the reasons for its inability to produce such evidence. Here there was not only no request for further discovery, but the record affirmatively shows that appellants were furnished with the examination papers written by all applicants on the July, 1972 examination. Thus, were there more than surmise to the asserted connection between Black English and the poor showing of black bar applicants, appellants had both the means and the duty to bring the pertinent facts forward. Their failure to do so cannot be construed as creating a fact issue precluding summary judgment.[5]

II. INHERENT DISCRIMINATION

Appellants' second contention is that, irrespective of intent, the Georgia bar examination inherently denies equal protection of the laws to black applicants because of the much greater rate at which they fail the examination. The two major issues that we must resolve in connection with this claim are: 1) the standard of judicial review which is applicable when only disparate performance by race has been shown, and 2) whether a material issue of fact remains that the applicable standard had been satisfied. As is frequently the case in equal protection suits, the first issue largely controls the second.

The district court determined that the appropriate standard of review was the "rational relationship" test, and that the Georgia bar examination satisfied this norm as a matter of law. For reasons that shall appear, we agree with the district court's ultimate conclusion on both points.

[6] Appellants' primary suggestion is that we should not view the Georgia bar examination within the framework of traditional equal protection analysis at all, but should instead apply by analogy the standards developed by the Equal Employment Opportunity Commission

5. Appellants also argue that we may find the bar examiners guilty of "intentional" discrimination merely for having continued to administer the examination with knowledge of its adverse impact on black applicants. This is of course no more than a sophisticated restatement of the claim that the bar examination is inherently unconstitutional, which we treat in Part II, *infra*.

for employment testing covered by Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C.A. § 2000e (EEOC guidelines). As construed by the Supreme Court in Griggs v. Duke Power Co., 1971, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, Title VII precludes the use of testing procedures which disproportionately exclude protected minorities, regardless of intent or motivation, unless they are "demonstrably a reasonable measure of job performance." *Id.* at 436, 91 S.Ct. at 856. Under the pertinent EEOC guidelines, which we have recognized to be a highly persuasive interpretation of Title VII, United States v. Georgia Power Co., 5 Cir. 1973, 474 F.2d 906, 913,

> [t]he use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by Title VII constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility as hereinafter described, and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use.

29 C.F.R. § 1607.3 (1974). Since it is undisputed that the Georgia bar examination has a greater adverse impact on black applicants than on whites and has never been the subject of a professional validation study, acceptance of appellants' suggested standard of review would inexorably compel the conclusion that the examination is unconstitutional.

Title VII does not apply by its terms, of course, because the Georgia Board of Bar Examiners is neither an "employer," an "employment agency," nor a "labor organization" within the meaning of the statute. 42 U.S.C.A. § 2000e. Nonetheless, appellants argue that it is appropriate to look to Title VII and its implementing guidelines to flesh out the fourteenth amendment equal protection guarantee both because the statute and the amendment share the common goal of interdicting racial discrimination and because the bar examination is in reality an "employment test;" indeed, they point out that the stakes are much higher than in an ordinary employment testing situation because failure results not in the loss of a specific job opportunity but in denial of the right to practice law in an entire state.

Quite understandably, appellees take the position that whether or not the bar examination meets the standards of a facially inapplicable statute is simply irrelevant to its constitutionality. This observation would ordinarily be all the discussion the point would warrant. However, as authority for their argument that Title VII and the fourteenth amendment should be equated, appellants have cited to us a number of Courts of Appeals decisions from other Circuits which have utilized the fourteenth amendment to apply Title VII and the EEOC guidelines virtually verbatim to employment tests administered by various public agencies.[6] We have given these decisions careful consideration, but on close analysis we conclude

6. Douglas v. Hampton, D.C.Cir. 1975, 512 F.2d 976; Davis v. Washington, D.C.Cir. 1975, 512 F.2d 956; Walston v. County School Board, 4 Cir. 1974, 492 F.2d 919; United States v. Chesterfield County School Dist., 4 Cir. 1973, 484 F.2d 70; Castro v. Beecher, 1 Cir. 1972, 459 F.2d 725; Chance v. Board of Examiners, 2 Cir. 1972, 458 F.2d 1167; Carter v. Gallagher, 8 Cir. 1971, 452 F.2d 315, *mod.* 1972, 452 F.2d 327 (en banc), cert. denied, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338.

there are several fundamental reasons why their principles cannot be extended to reach the Georgia bar examination as appellants suggest.

The first of these reasons is that, viewed in the perspective of their somewhat unique factual context, the cases on which appellants rely do not necessarily stand for the sweeping propositions for which they cite them. The courts which have treated the fourteenth amendment and Title VII as embodying fungible standards have done so only in the narrow context of employment tests administered by governmental entities such as police and fire departments. This is significant because Title VII, as originally enacted, provided a specific exemption from the Act's requirements for governmental units. Thus, in suits involving challenges to the personnel practices of public agencies, courts were frequently confronted by the anomalous situation of a public employer who was theoretically free to engage in selection practices which would be clearly illegal for a private employer under Title VII. But prior to the time of appellate decision in each of these cases but *Carter v. Gallagher, supra*, this anomaly had been potentially removed by Congress' enactment of the Equal Employment Opportunity Act of 1972, Pub.L. 92–261, 86 Stat. 103, which deleted the governmental exemption from Title VII and clearly expressed Congressional intent to reach the employment practices of the agencies in question; however, direct Title VII relief was still barred by the fact that the complaints had been filed prior to the 1972 amendments to the Act.

The response of some courts was to bridge this gap by virtually incorporating Title VII and the EEOC guidelines into the fourteenth amendment. Whatever the justification for this approach in these narrow circumstances, we think it overly simplistic to read these decisions, as appellant would have us do, as authority for the general proposition that Title VII and the equal protection clause should be read interchangeably whenever the goals to be served are the same and the subject matter is at least arguably related, particularly when the decisions have not been read so broadly by the Circuits that rendered them.[7].

A second important consideration is that the cases on which appellants rely do not state the controlling law of this Circuit, but are in fact contrary to it. We confronted the issue of testing for public employment in Allen v. City of Mobile, 5 Cir. 1972, 466 F.2d 122, which involved a challenge to the constitutionality of a written test used by the Mobile, Alabama police department as part of its requirements for promotion to the rank of sergeant. The district court sustained this test despite a showing of demonstrable adverse impact on blacks. In doing so, it recognized the relevance of *Griggs'* holding that tests which disadvantage minorities should be job-related, but declined to use this as a springboard to apply the full panoply of EEOC guidelines to a test falling outside the scope of Title VII; it specifically refused to require that the test be professionally validated. Instead, the court personally examined the challenged test and concluded that the skills it measured, such as reading and comprehension, memory, note-taking and verbal skills, were useful attributes for a policeman, particularly one in a supervisory position. Based on this conclusion, it upheld the test on the ground that "[i]t bears a rational relationship to the ability to perform the

7. See note 9, *infra*.

work required." Allen v. City of Mobile, S.D.Ala.1971, 331 F.Supp. 1134, 1146.

On appeal, the sole issue was whether the district court had applied the correct legal standard in dealing with the test. We affirmed *per curiam*, on the basis of the district court's order and decree. Moreover, Judge Goldberg's dissenting opinion removed any remaining doubt that, in affirming, we squarely confronted and rejected the contention that Title VII and its implementing EEOC guidelines were applicable to testing outside the scope of the Act. In an exhaustive opinion, Judge Goldberg argued that the majority had erred in declining to follow precisely the cases on which appellants rely and in refusing to hold, as had they, that Title VII standards may be applied by analogy through the fourteenth amendment.

Thus, were the precise issue decided by the cases on which appellants rely before us today, we would be compelled to reject their holdings on the authority of our decision in *Allen*. *See* McClure v. First Nat'l Bank, 5 Cir. 1974, 497 F.2d 490, 492. Needless to say, this fact also makes appellants' cases somewhat less than persuasive authority in this Circuit.

However, even were we not constrained by *Allen*, we would view a subsequent Supreme Court decision, which declined the opportunity to equate the equal protection clause and Title VII in a similar situation, as the most persuasive authority on the proper relationship between the Act and the fourteenth amendment. In Geduldig v. Aiello, 1974, 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256, the Supreme Court dealt with the question of whether the California Unemployment Compensation Disability Fund could, consonantly with the equal protection clause, exclude disabilities associated with normal pregnancy from the fund's coverage. While this state-administered plan was outside the scope of Title VII, as is the Georgia bar examination, this precise issue was the subject of an EEOC regulation promulgated pursuant to Title VII, which stated in pertinent part that ". . . payment under any . . . temporary disability plan . . ., formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." 29 C.F.R. § 1604.10(b)(1974)

The Supreme Court, however, concluded that since normal pregnancy is an objectively identifiable physical condition, distinctions involving pregnancy do not constitute sex-based classifications unless they are shown to be mere pretexts for invidious discrimination against one sex or the other. By applying the rational relationship test, the Court then found that California's exclusion of such disabilities from the fund's coverage was consistent with the equal protection clause. But perhaps more significant than its holding is the fact that, in reaching its conclusion that "this case is thus a far cry from cases . . . involving discrimination based on gender as such," *Id.* at 496 n. 20, 94 S.Ct. at 2492, the Court felt it necessary neither to distinguish nor even to mention the EEOC's contrary view under Title VII, even though under appellants' suggested analysis the EEOC guideline would have conclusively established that the exclusion of pregnancy related disabilities constituted illegal sex discrimination. In our view, the unmistakable import of the Supreme Court's method of analysis is that a *constitutional* challenge to a method of classification must be decided by *constitutional* standards, and that while the EEOC guidelines are entitled

to great deference in determining what Congress intended to accomplish through Title VII, Albemarle Paper Co. v. Moody, 1975, — U.S. —, 95 S.Ct. 2362, 44 L.Ed.2d —, they do not carry similar weight in interpreting the minimum commands of the fourteenth amendment.

Our reading of this decision is in accord with recent decisions of other Circuits. As might be expected, the continuing viability of the EEOC temporary disability guidelines following *Geduldig* was drawn into question by a number of employers who argued essentially the other side of the coin appellants urge here; *i. e.*, since differing treatment of pregnancy-related disabilities is not invidiously discriminatory for the purposes of the equal protection clause, neither should it be considered discriminatory for the purposes of Title VII. To date, this contention has been considered by the Second, Third, and most recently, the Fourth Circuits; all have rejected the facile equation of Title VII and the fourteenth amendment. As the Second Circuit put it:

> Title VII is legislation of this nature, designed to prohibit a broad spectrum of discriminatory evils which Congress deemed would have such an adverse effect. There is no requirement that the discriminatory practices forbidden by this statute should be limited to practices violative of the Equal Protection Clause. *Practices forbidden by Title VII and the EEOC guidelines issued thereunder may, nonetheless, be able to survive Equal Protection attack.*

Communications Workers of America v. American T. & T., 2 Cir. 1975, 513 F.2d 1024, 1031 (emphasis added). *Accord*, Wetzel v. Liberty Mutual Ins. Co., 3 Cir. 1975, 511 F.2d 199, *cert. granted*, — U.S. —, 95 S.Ct. 1989, 44 L.Ed.2d 476; Gilbert v. General Electric Co., 4 Cir. 1975, — F.2d —.[8] This is of course the crux of our refusal to measure the constitutionality of the Georgia bar examination by Title VII standards.[9]

[7] But because we find no basis for holding that a bar examination must be professionally validated or that bar examiners are required to demonstrate the unavailability of alternative means of measuring professional competence, *see* 29 C.F.R. § 1607.3 (1974), does not mean that the "job-relatedness" of an examination has no relevance to its constitutionality. The hallmark of a rational classification is not merely that it differentiates, but that it does so on a basis having a fair and substantial relationship to the purposes of the classification. Reed v. Reed, 1971, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225. What we do hold, however, is that the necessary relationship must be determined by constitutional, not statutory, standards.[10]

[8, 9] Assuming we find that traditional methods of equal protection analysis are applicable, appellants alternatively contend that the correct standard of review is not the "rational relationship" test relied on by the district court, but the "compelling state interest" test utilized when state action creates a racial or other "suspect classification" or impinges on a judicially-declared "funda-

8. Although not necessary to our reliance on them, each of these decisions also found the EEOC guidelines on treatment of pregnancy related disabilities to be a valid interpretation of Title VII.

9. Significantly, two of the Circuits on whose decisions appellants rely are among the three which have refused to equate Title VII and the fourteenth amendment in interpreting *Geduldig*.

10. See text accompanying note 11, *infra*.

mental interest." The gravamen of their argument is that the disproportionate passing rates of black and white applicants on the examination serve to create the classification based on race which is needed to trigger strict judicial scrutiny. The difficulty with this position, however, is that it stands in the face of a clear body of law holding that an otherwise legitimate classification does not become constitutionally "suspect" simply because greater numbers of a racial minority fall in the group disadvantaged by the classification. Jefferson v. Hackney, 1972, 406 U.S. 535, 92 S.Ct. 1724, 32 L.Ed.2d 285; James v. Valtierra, 1971, 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed.2d 678. *Cf. Geduldig v. Aiello, supra* (pregnancy not necessarily a sex-based classification even though only women may become pregnant).

James, for example, concerned the constitutionality of a California constitutional provision which required approval by referendum for low-income housing projects. One of the plaintiffs' primary strategies in attacking this constitutional provision was to attempt to bring it within the ambit of Hunter v. Erickson, 1969, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616, which only two years before had struck down a city charter amendment requiring voter approval of certain antidiscrimination ordinances on the ground that the amendment created a classification based on race. The *James* plaintiffs argued, successfully at the three-judge court level, that the California provision likewise created a racial classification because of the high statistical correlation between the poor and racial minorities. The Supreme Court, however, rejected the analogy and reversed, stating:

> Unlike [Hunter], it cannot be said that California's Article XXXIV rests on "distinctions based on race." Id., at 391, 89 S.Ct. [557] at 561. The Article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its fact is in fact aimed at a racial minority. *Cf. Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960). The present case could be affirmed only by extending *Hunter*, and this we decline to do.

402 U.S. at 141, 91 S.Ct. at 1333.

Likewise, in *Jefferson v. Hackney, supra*, the Court brushed aside the "naked statistical argument" that it was unconstitutional to fund an AFDC program at a lower percentage of recognized need than other categories of assistance because of the higher percentage of minority recipients in the AFDC category with the observation that

> [t]he acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by current welfare programs could survive such scrutiny, and we do not find it required by the Fourteenth Amendment.

406 U.S. at 548–49, 92 S.Ct. at 1732.

Appellants seek to avoid the thrust of these decisions by arguing that they are distinguishable as "social welfare" decisions. Noting that the Supreme Court has frequently held that states are to be allowed greater latitude in formulating economic and social welfare policy than in other areas, *Geduldig, supra*, 417 U.S. at 495, 94 S.Ct. 2485; Dandridge v. Williams, 1970, 397 U.S. 471, 486–87, 90 S.Ct. 1153, 25 L.Ed.2d 491 they remind us that the right to practice law in Georgia is not a resource which the state may either conserve or allocate. However, this purported distinction misses the point. The difference between economic and social welfare cases and others lies in the precision with which the state is required to draw classifications in seeking to achieve its objectives, and not in the amount of adverse impact on minority groups which is permissible before an otherwise legitimate classification becomes constitutionally "suspect."

Thus, for example, a state may constitutionally presume that widows are more in need of financial assistance than widowers when legislating a property tax exemption, Kahn v. Shevin, 1974, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189, or that AFDC recipients require a lower percentage of need than those in other categories of assistance, *Jefferson v. Hackney, supra*, despite the fact that these classifications are demonstrably both over- and underinclusive; however, a state may not similarly assume that men make better estate administrators than women in the sole interest of eliminating a class of contests for letters of administration. *Reed v. Reed, supra*. But, no one would seriously contend that any economic resource, however, scarce, could be conserved by denying its benefits outright to a racial or other suspect minority. *See* Shapiro v. Thompson, 1969, 394 U.S. 618, 633, 89 S.Ct. 1322, 1330, 22 L.Ed.2d 600 ("The saving of welfare costs cannot justify an otherwise invidious classification.") However, since Georgia bar examinees are not judged on the basis of broad generalizations, but rather on the basis of individualized determinations of whether each applicant possesses the minimal competence required to practice law, the "social welfare" distinction simply has no significance in this case.

[10] The foregoing of course does not mean that any facially neutral method of classification automatically escapes more than minimal judicial scrutiny. An apparently neutral scheme may be merely a subterfuge for invidious discrimination, Gomillion v. Lightfoot, 1960, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110, or may be discriminatorily applied, Yick Wo v. Hopkins, 1886, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220. Moreover, in appropriate cases this Court has held that statistical evidence of disparate racial impact alone may establish a *prima facie* case of racial discrimination, shifting to the defendant the burden of demonstrating that invidious discrimination was not among the reasons for his actions. *Compare* Bing v. Roadway Express, Inc., 5 Cir. 1971, 444 F.2d 687 with Robinson v. City of Dallas, 5 Cir. 1975, 514 F.2d 1271 [1975]. However, we need not decide if this is a case where "statistics . . . tell much, and Courts listen," Alabama v. United States, 5 Cir. 1962, 304 F.2d 583, 586, *aff'd per curiam*, 371 U.S. 37, 83 S.Ct. 145, 9 L.Ed.2d 112, because of our prior conclusion that appellees have carried their burden under *Fed.R.Civ.P.* 56 of demonstrating the absence of any genuine issue of material fact regarding intentional racial discrimination. Thus, even were we to assume that the burden of proof has shifted, it must also be deemed to have been met.

Since the Georgia bar examination does not establish a constitutionally suspect racial classification and no claim is made that a fundamental interest is involved, there is no legal basis for applying the compelling state interest test and the proper standard of review becomes the rational relationship test utilized by

the district court. Appellants nonetheless urge that the district court, which relied mainly on Schware v. Board of Examiners, 1957, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 as authority for its standard of review, erred in failing to apply what they term the somewhat stricter burden of rationality exemplified by more recent decisions such as *Reed v. Reed, supra*, on the ground that the racial discrimination involved in this case is even more highly suspect than the gender-based discrimination in *Reed*.

Appellants' argument for invoking *Reed* is, of course, specious. As the Supreme Court succinctly stated in *Jefferson, supra*, 406 U.S. 535, 547, 92 S.Ct. 1724, 1732: "The standard of judicial review is not altered because of appellant's unproved allegations of racial discrimination." This is not to say that *Reed* has no relevance to this appeal; however, its significance is of little comfort to appellants. In our view, *Reed* and related decisions such as Frontiero v. Richardson, 1973, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583, serve to reemphasize the desirability and relative relationality, at least outside the area of economic and social welfare programs, of classifications which act directly upon the quality they purport to measure as compared to classifications which attempt to achieve their intended objectives through indirection, often by the use of ill-fitting and stereotyped generalizations. Since, as we have previously noted, the Georgia bar examination provides an individual, anonymous determination of each applicant's present competence to practice law, it comports with this aspect of the teaching of *Reed* and its progeny. Accordingly, the existence of these intervening decisions in no way denigrates the district court's reliance on the Supreme Court's earlier statement in *Schware, supra*, 353 U.S. 232, 239, 77 S.Ct. 752, 756, 1 L.Ed.2d 796, that "[a] state can require high standards of qualification such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law," as its source of authority for the appropriate standard of review.

Appellant's final argument regarding inherent discrimination is that, even if we should find the district court adopted the correct standard of review, it improperly resolved disputed issues of fact in reaching its conclusion that the bar examination possesses a rational connection with an applicant's fitness to practice law. This contention is simply devoid of merit.

[11, 12] Appellants concede, as they must, that the state has a legitimate and substantial interest in excluding from the practice of law those persons who do not meet its standards of minimal competence and that the Georgia examination, as presently constituted, tests skills and knowledge which have a "logical, apparent relationship" to those necessary to the practice of law.

While appellants valiantly argue otherwise, these facts are sufficient in themselves to establish the rationality of the bar examination in the constitutional sense. If a state has the right to insist on a minimum standard of legal competence as a condition of licensure, it would seem to follow *a fortiori* that it may require a demonstration of such competence in an examination designed to test the fundamental ability to recognize and deal with legal principles.

Another important indicium of rationality is that the Georgia bar examination satisfies the two criteria of a rational

examination we identified in Armstead v. Starkville Municipal Separate School Dist., 5 Cir. 1972, 461 F.2d 276, in which we held the Graduate Record Examination to be an unconstitutional method for selecting primary and secondary school teachers. There we suggested that a rationally supportable examination should 1) be designed for the purpose for which it is being used, and 2) utilize a cutoff score related to the quality the examination purports to measure. The Georgia bar examination meets both qualifications. Both the essay and MBE portions of the examination are designed solely to assess the legal competence of bar examinees; and while the minimum passing score of 70 has no significance standing alone, it represents the examiners' considered judgments as to "minimal competence required to practice law," the precise quality the examination attempts to measure.[11]

[13] The disputed fact issues which appellants claim necessitate a trial, such as whether the bar examination covers a sufficiently broad domain of subject matter or tests an adequate range of legal skills, are at botton only claims that the examination could be improved. While the difference between minimal and strict scrutiny is necessarily a matter of degree, this argument overlooks one of the most fundamental distinctions between the two standards of review—the relevance of the availability of alternative means. While a party defending a classification subject to strict judicial scrutiny must demonstrate that the state has no other available alternative which impinges less on the protected interest involved, *see, e. g.*, Shelton v. Tucker, 1960, 364 U.S. 479, 488, 81 S.Ct. 247, 5 L.Ed.2d 231, the focus of the rational relationship test is not whether the state has superior means available to accomplish its objectives, but whether the means it has chosen is a reasonable one. Viewed from this perspective, appellants' asserted "fact issues" are simply not material.

[14, 15] The same observation applies to appellants' contentions that the bar examination is irrationally administered because its outcome depends so heavily on the subjective grading judgments of the examiners. Since subjective, as opposed to objective, grading is a necessary corollary to the administration of essay-type questions, an attack on subjective grading *per se* must perforce include the allegation that the use of essay examinations is itself irrational. This contention has uniformly been rejected by the courts which have considered it, for reasons succinctly articulated in an unreported opinion granting partial summary judgment in one of the consolidated actions comprising this appeal. There the court said:

> The relevant question must then be whether the passing of an examination made up of subjective, essay-type questions has a rational connection with the applicant's ability to practice law in the State of Georgia. It is beyond question that it does. While plaintiff would apparently favor a more objective type of examination, much of an attorney's actual work once admitted into practice involves the analysis of complicated fact situa-

11. *See also* Baker v. Columbus Municipal Separate School Dist., 5 Cir. 1972, 462 F.2d 1112, 1114–15. While appellants suggest that there is language in *Baker* which indicates that strict scrutiny is generally applicable to qualifying examinations, the basis of our holding there was the affirmance of an explicit finding of purposeful racial discrimination. For this reason, the compelling state interest test was the appropriate standard of review in *Baker*.

tions and the application thereto of abstract legal principles. Both in legal practice and with these essay-type questions, recognition of the legal problem presented and well-reasoned explication of the relevant considerations is of utmost importance.

Banks v. Miller, Civil No. 15876 (N.D.Ga., August 11, 1972) (footnote omitted). *Accord*, Whitfield v. Illinois Board of Law Examiners, 7 Cir. 1974, 504 F.2d 474, 477; Feldman v. State Board of Law Examiners, 8 Cir. 1971, 438 F.2d 699, 703; Chaney v. State Bar of California, 9 Cir. 1967, 386 F.2d 962, 964, *cert. denied*, 1968, 390 U.S. 1011, 88 S.Ct. 1262, 20 L.Ed.2d 162. Appellants' further arguments that the examiners should uniformly be required to use model answers and pre-determined standards in grading are again merely suggestions for improvement, and do not raise a fact issue as to whether the examination itself is rational.

[16] Finally, we flatly reject appellants' contentions that the Board's practice of regrading failing papers falling close to the passing mark, or of comparing examination results with law school records as an informal check on the examiners' performance, is evidence of the irrationality of the examination. We fully agree with the statement in appellees' brief that "[t]he Constitution does not require a perfect test nor should it require the examiners to act as if the test were perfect." Indeed, it is curious logic to condemn the examiners for utilizing practices designed to recognize the inherent limitations of testing and for attempting to give the benefit of the doubt to applicants who may have been adversely affected by those limitations. Similarly, we see no infirmity in the fact that the standards for determining which papers are to be regraded are not fixed and immutable and may depend in part upon the exercise of an examiner's discretion.

[17, 18] Nor do we find it irrational for the examiners to compare examination results with law school records as one informal, after-the-fact means of judging the quality of the examination. Since Georgia as well as other states requires graduation from law school or its equivalent as a prerequisite to taking the bar examination, a requirement which appellants do not challenge here, it is certainly reasonable to assume that legal training is highly instrumental in developing the qualities that comprise "minimal competence to practice law" and that the overall performance of graduates of various institutions bears some logical relevance to how well the examination is measuring these qualities. The fact remains, of course, that each applicant's examination is graded without knowledge of his particular legal background. Accordingly, we have no hesitancy in affirming the district court's holding that the Georgia bar examination "has a rational relationship to an applicant's fitness to practice law. . . . "

III. DUE PROCESS REVIEW

[19] In addition to the equal protection claims we have previously discussed, appellants also contend that the failure to provide any procedure for review of a failing grade at the behest of the examinee constitutes a denial of due process of law. The district court's view was that such review is not constitutionally required, primarily because an unqualified right to retake the examination at its next regularly scheduled administration both satisfies the purposes of a hearing and affords it protection. We agree.

The safeguards of the due process clause are of course available to a failing bar applicant. As the Supreme Court stated in *Schware, supra:*

> A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.

585 U.S. at 238–39, 77 S.Ct. at 756.

[20] While the opportunity to be heard is generally considered a fundamental component of due process, entitlement to a hearing does not automatically flow from a finding that procedural due process is applicable. *See, e. g.*, North American Cold Storage Co. v. Chicago, 1908, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195. As the Supreme Court observed in Hannah v. Larche, 1960, 363 U.S. 420, 442, 80 S.Ct. 1502, 1515, 4 L.Ed.2d 1307:

> "Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.

[21] In the first instance, whether due process requires a particular procedure in a given situation must be determined by balancing the individual's interest in avoiding the loss which lack of the procedure inflicts upon him against the interests which the government seeks to advance by denying it. Goldberg v. Kelly, 1970, 397 U.S. 254, 262–63, 90 S.Ct. 1011, 25 L.Ed.2d 287. In arguing that this balance should be struck in favor of allowing a failing bar examinee a hearing, appellants rely heavily on an applicant's undoubted interest in pursuing his chosen profession. But such reliance misses the mark. While this interest is admittedly a weighty one in determining whether due process protections are applicable, *see* Atlanta Attractions, Inc. v. Massell, N.D.Ga.1971, 332 F.Supp. 914, *aff'd*, 5 Cir. 1972, 463 F.2d 449, it militates similarly in favor of a hearing only if hearings are demonstrably more efficacious means of safeguarding that interest than the unqualified right of reexamination which Georgia currently provides. We think they are not.

First, since regularly scheduled examinations are held every six months, and each administration of the examination produces scores of unsuccessful applicants who would be entitled to hearings, we think it unlikely that providing a hearing would afford significantly quicker relief to an erroneously failed applicant than would the right to retake the examination at its next administration.

Second, we think it likewise unlikely that a hearing would be significantly more effective in exposing grading errors than would reexamination. At a hearing, the issue of course would not be whether the examiner had given an applicant the "correct" grade, but rather whether either a mechanical error had been made in computing the grade or the grade given by the examiner was arbitrary, capricious, and without foundation. Since "it is not to be presumed that powers conferred upon the administrative boards will be exercised arbitrarily," Douglas v. Noble, 1923, 261 U.S. 165, 170, 43 S.Ct. 303, 305, 67 L.Ed. 590, we may presume that such errors are infrequent. Even making the generous as-

sumption that one out of every hundred applicants who take the examination fail when they should have passed due to arbitrary grading, the probability that the same individual would be the victim of error after two reexaminations is literally one in a million.[12] Since the hearing process is itself susceptible to error, we see little advantage to it on this score.

The one area in which a hearing would appear to be a superior remedy to reexamination is in removing whatever stigma may attach to an individual from having previously failed the bar examination in the rare case where the failure was unjustified. Such undeserved stigma, however, is not only rare but far removed factually from that occasioned by the public "posting" as a drunkard which was involved in Wisconsin v. Constantineau, 1971, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515; but more important, it also presents entirely different issues than those involved when an individual is denied admission to the bar on the ground of moral unfitness. *See* Willner v. Committee on Character and Fitness, 1963, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224. While an adverse determination on character and fitness tends to exert a continuing detrimental effect on an individual's opportunity to be admitted to practice, unless and until rebutted, failure on a bar examination does not stigmatize an individual as "incompetent," but merely indicates that he did not demonstrate minimal competence on a particular examination. Upon reexamination, such an individual is entitled to have his paper graded by the same standards as those of everyone else, and if he passes, to be admitted on precisely the same basis as an applicant who had not previously taken the examination. For these reasons, we consider the "liberty interest" a failing examinee has at stake to be a minor, if not a non-existent one. *Cf.* Sims v. Fox, 5 Cir. 1974, 505 F.2d 857, 862–64 (en banc).

In contrast, we find the interests which the state seeks to advance by substituting reexamination for a hearing to be substantial. The most important of these interests is, of course, avoidance of the administrative burden which a hearing requirement would entail. Since, as we have noted, scores of applicants fail the Georgia bar examination each time it is given, and all examiners are involved in the grading of each paper, the result of requiring a hearing would be the imposition of what the Seventh Circuit has described as "an intolerable burden upon the bar examiners," Whitfield v. Illinois Board of Bar Examiners, 7 Cir. 1974, 504 F.2d 474, 478, especially when one considers that bar examiners are not full-time administrators but practicing attorneys. While such administrative concerns are not in themselves controlling, they are certainly relevant, Richardson v. Perales, 1971, 402 U.S. 389, 406, 91 S.Ct. 1420, 28 S.Ct. 842, and become particularly so when the gains to be realized through the imposition of an additional administrative burden are as minimal as they are here. Moreover, as *Whitfield, supra*, has observed, the initiation of a hearing requirement as a supplement to, rather than as a substitute for, the right of reexamination (as we are certain appellants view their due process claim) might result in unfair disadvantage to those applicants taking the examination for the first time.

12. See Comment, Review of Failing Bar Examinations: Does Reexamination Satisfy Due Process?, 52 *Bos.U.L.Rev.* 286, 301 N. 115.

Finally, in weighing the "complexity of factors" which serve to shape the contours of the process which is due here, we do not write on a clean slate. The precise issue before us has been considered squarely by one Circuit, *Whitfield, supra*, 504 F.2d 474, 477–79; inferentially by another, Chaney v. State Bar of California, 9 Cir. 1967, 386 F.2d 962, 967, *cert. denied*, 1968, 390 U.S. 1011, 88 S.Ct. 1262, 20 L.Ed.2d 162; and in *dictum* by a third, Feldman v. State Board of Law Examiners, 8 Cir. 1971, 438 F.2d 699, 703 n. 6. All have concluded, as have we, that a hearing is not required. These decisions, which we consider sound and well-reasoned, reinforce our conviction that the balance we have struck is the proper one.

Accordingly, since the record reveals no disputed issues of material fact and the applicable principles of law clearly demonstrate that appellees are entitled to prevail, the district court's award of summary judgment to appellees is

Affirmed.

ADAMS, Circuit Judge (dissenting):

Since I believe the majority decision rests upon a tenuous resolution of pivotal factual issues in a troublesome area of the law where residual doubts at this stage of the proceedings should be resolved in favor of the plaintiffs, I must, with deference to the comprehensive opinion of the majority, dissent.

a.

My dissent is based in large measure on the nature of the uncontradicted facts which plaintiffs have advanced to establish a case of racial discrimination violative of the equal protection clause of the fourteenth amendment.[1]

The central focus of this litigation is that black applicants as a class have for a period of years experienced a severely disproportionate number of failing marks on the Georgia bar examination. As the majority opinion candidly concedes, this situation reached a nadir in July, 1972, when each of the 40 black applicants failed; and continued in February and July, 1973, when more than one-half the black applicants were unsuccessful, compared to a failure rate of one-fourth to one-third among white examinees.

b.

The administration of a state policy that is neutral on its fact but which results in unequal application to those entitled to be treated alike is not in itself a denial of equal protection. Rather, it must be demonstrated that there is present an element of purposeful discrimination. Such purposeful discrimination, however, may be evidenced by a systematic, long-continued pattern of unequal results.[2]

A colorable case of purposeful racial discrimination is set forth where sustained *de facto* discrimination is shown together with the absence of an investigation, or indeed any effort, by the administrators of the state program in question to ascertain whether the seemingly purposeful discrimination is intentional in fact or is explainable by the circumstances.[3] This is so because a pre-

1. The fourteenth amendment provides in part: "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

2. Snowden v. Hughes, 321 U.S. 1, 8–9, 64 S.Ct. 397, 88 L.Ed. 497 (1943).

3. Hill v. Texas, 316 U.S. 400, 404, 62 S.Ct. 1159, 86 L.Ed. 1559 (1942); Hawkins v. Town of Shaw, 437 F.2d 1286, 1288 (5 Cir. 1971),

sumption of racial inferiority is simply not permissible.[4]

c.

Bridgeport Guard. Inc. v. Members of Bridgeport Civil Service Comm'n[5] was a suit by nearly all the black policemen of the City of Bridgeport who had not passed a particular civil service examination. The Second Circuit held that the defendants had a heavy burden to meet the plaintiffs' *prima facie* case of invidious discrimination in view of a practice that resulted in a disparity of substantial magnitude between the hiring of whites and blacks. This Court has stated that "[w]henever the effect of a law or policy [use by school district of a 1,000 cut-off score in the National Teachers Examination as a condition of employment] produces . . . a [significant] racial distortion it is subject to strict scrutiny."[6]

Based on a fair reading of the pleadings and the depositions here—with all inferences resolved in favor of the plaintiffs, as required on summary judgment—it would appear that the defendants have not met their burden of disproving purposeful discrimination in the application of the Georgia bar examination.

The plaintiffs have raised the question whether black examinees, although initially anonymous, can be racially identified by graders of the essay portion of the examination because of the use of "Black English." As the majority properly points out, proof of identification of bar examinees by race may be difficult. However, the difficulty of proof does not eliminate its possibility. Surely such difficulty, without more, should not bar, in the context of this case, affording the plaintiffs the opportunity of offering any such evidence at trial.

In addition, the use of the objective MBE in combination with the essay examination raises a question of the weight accorded each when the examiners come to the point of ascertaining final grades. Also, the selection of cut-off scores, especially when such selection is not subject to review, may be arbitrary. The legality of such decisions may not properly be resolved by mere reference to the good faith judgment of the bar examiners.[7]

d.

The reliance by the district court and the majority on *Schware v. Board of Bar Examiners*[8] would appear to be misplaced. *Schware* dealt with the case of a single, white law school graduate denied the right to take the New Mexico bar examination on the ground that he was "morally unfit." The Supreme Court decided that the New Mexico bar examiners did not have a rational basis for denying the plaintiff that right. The Court was not called upon to consider

modified en banc on other grounds, 461 F.2d 1171 (1972); *see* Armstead v. Starkville Municipal Separate School Dist., 461 F.2d 276, 279–280 (5 Cir. 1972).

4. Brown v. Allen, 344 U.S. 443, 471, 73 S.Ct. 397, 97 L.Ed. 469 (1953).

5. 482 F.2d 1333, 1337 (2d Cir. 1973).

6. Baker v. Columbus Municipal Separate School District, 462 F.2d 1112, 1114 (5 Cir. 1972).

7. Id. at 1114. I do not mean by this statement to impugn the integrity of the examiners. Rather, I suggest only that it is not appropriate to foreclose an attempt by plaintiffs to establish this fact.

8. 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957).

the question whether more than a rational basis for denying admission to the bar examination to Schware was required.

e.

The EEOC guidelines for employment testing[9] and the principles enunciated in *Griggs v. Duke Power Co.*[10]—both of which require a validation of a suspect employment test—are at least persuasive as to the criteria to be applied to the Georgia bar examination under the facts of this case. As plaintiffs point out, the examination here, although not administered by an "employer" for the purpose of hiring, is for all practical purposes an employment test. The applicant who fails it may not, in any respect, be employed to practice law within the state.

Moreover, the philosophy underlying the Civil Rights Act would appear to encompass this type of examination. As the Supreme Court pointed out in *Griggs*: "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[11]

The majority declares that *Allen v. Mobile*[12] does not permit the *Griggs* standard to be applied in an area other than that to which the Civil Rights Act is expressly directed. In *Allen* this Court, without referring to *Griggs* or the EEOC guidelines, affirmed *per curiam* the decision of the district court judge, reached after trial, that an alleged discriminatory written test used for promoting police officers was reasonably or rationally job-related. Judge Goldberg dissented on the ground that the district court, and the majority in affirming the district court, had misconstrued the standard *Griggs* required.[13] Neither the *per curiam* affirmance of the trial court's holding in itself nor the *per curiam* as clarified by the dissent warrants a rejection out of hand of any utilization whatever of either the *Griggs'* standard or the EEOC guidelines.

f.

Nor do I believe that the recently decided *Geduldig v. Aiello*,[14] relied on by the majority, is in any way controlling. The facts and governing law of *Geduldig* are substantially distinguishable from those here. The California unemployment compensation disability fund, which is supplementary to the state's workmen's compensation program, excludes from its coverage disabilities resulting from normal pregnancy and childbirth. The Supreme Court, in reviewing the exclusion of pregnancy and childbirth coverage, did not apply EEOC directives on pregnancy because no invidious discrimination was perceived. A state social welfare program necessarily must draw a line somewhere, the Supreme Court stated. The exclusion of one disability was not suspect where other comparable disabilities were also excluded.[15] The particular disability was

9. Interpreting and implementing Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C.A. § 2000e.

10. 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

11. Id. at 430, 91 S.Ct. at 853.

12. 466 F.2d 122 (5 Cir. 1972), *cert. denied*, 412 U.S. 909, 93 S.Ct. 2292, 36 L.Ed.2d 975 (1973).

13. Id. at 126.

14. 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974).

15. *Compare* James v. Valtierra, 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed.2d 678 (1971) with Hunter v. Erickson, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969).

sex-related but the decision to exclude it from coverage, said the Supreme Court, was not predicated on sex but on the limited financial resources available in the compensation fund. Such reasoning is not apposite here.

g.

Plaintiffs in this case have established what amounts to an exclusion from job opportunities of a disproportionate number of blacks. These facts call for a stricter standard of review than the standard the majority approves today. Of even more significance, in a case of this importance where one of the key factors in determining illegality will be the evaluation of motive, it seems particularly inappropriate to employ the device of summary judgment.[16] Summary judgment may be used only when no genuine issues of fact remain unresolved.

For all the reasons pointed out above, I would reverse the grant of summary judgment and remand the case to the district court for a trial on the merits.

16. Poller v. Columbia Broadcasting System, 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962).

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

United States Court of Appeals
Fifth Circuit
Office of the Clerk

September 26, 1975

TO ALL COUNSEL OF RECORD

No. 74-3413 - Eugene W. Tyler vs. Trammell E. Vickery, et al.***Ralph Banks, Jr. vs. Trammell E. Vickery, et al.*** James E. C. Perry, et al. vs. Edward S. Sell, Jr., et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition() for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition() for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By s/Clare F. Sachs
Deputy Clerk

[Filed June 27, 1974]
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES E. C. PERRY, et al.,

vs. C.A. No. 17688

EDWARD S. SELL, JR., et al.

RALPH BANKS, JR., C.A. No. 15867

vs.

TRAMMELL E. VICKERY, et al.

EUGENE W. TYLER,

vs. C.A. No. 15866

TRAMMELL E. VICKERY, et al.

ORDER

This is a class action for declaratory and injunctive relief brought under the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §§1981, 1983, alleging that the defendants, individual members of the Georgia State Board of Bar Examiners and certain other public officials, discriminated against black persons in the adminis-

tration of the Georgia bar examination.[1] Federal jurisdiction is invoked pursuant to 28 U.S.C. §1343. The case is now before the Court for consideration of defendants' motion for summary judgment. Defendants urge that there is no genuine question of fact as to any material issue and therefore, pursuant to Fed.R.Civ.P. 56, judgment should issue in their favor. In ruling upon this motion the court will examine each issue presented to determine what, if any, issues require a trial for resolution.

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1. The named plaintiffs seek declaratory and injunctive relief on behalf of themselves and the following class of persons: Those black law school graduates who have taken and failed the Georgia bar examination and have not subsequently passed the examination or otherwise been admitted to practice law in Georgia. Also to be included within the class are those black law school graduates who will take the bar examination in the future. Perry v. Sell, Civ. No. 17688 (N.D. Ga., Sept. 27, 1973).

I. INTENTIONAL DISCRIMINATION

The plaintifs allege that defendants have purposely discriminated on the basis of race against black applicants in the grading of the Georgia bar examination. From a review of the entire record, the Court finds this accusation in the pleadings to be totally without factual foundation.

The uncontradicted facts in the record show that all bar examination papers are graded by number only. These numbers are drawn on separate cards by the applicants on the first day of the examination, their names put thereon, and sealed in envelopes by the examinees. Thereafter, these cards, which match the identification number used on the applicants' examinations with the name of each applicant, are kept in a sealed container until grading is completed. The depositions further verify that the examiners do not have knowledge of the identity or race of any applicant during the grading process. The possibility, as plaintiffs contend, of an examiner learning the name or race of an applicant by looking at his application or name card has no effect on the grading since an applicant's number cannot be ascertained by this method. Mere allegations by plaintiffs that an opportunity is presented in this procedure to discover an examinee's name or race is unsupported by any evidence of specific

facts or knowledge on their part.[2]

Fed.R.Civ.P. 56 provides that when a moving party supports its motion for summary judgment by evidence, the opposing party must then set forth evidence showing a genuine issue of fact justifying a trial. A party opposing the motion for summary judgment "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise. . . must set forth specific facts showing there is a genuine issue for trial." Fed.R.Civ.P. 56. Accordingly, as the defendants' evidence on the question of the examiners' knowledge of an applicant's identity has not been contradicted by plaintiffs, summary judgment for defendant is proper on this issue.

II. ARBITRARINESS

Plaintiffs allege that defendants

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2. Plaintiffs also allege that blacks have a unique writing style which is easily detected by the examiners. No factual support is offered for this proposition and the occurrence of such a fact has been denied by each defendant. Furthermore, since February, 1972, the Multistate Bar Examination (MBE), adopted in Georgia, has offered an objective assessment of an examinee's legal knowledge. Of the forty black persons who took the July, 1972 examination, only one passed the MBE but failed the total examination. Similar experiences have been found to exist on the subsequent examinations. The Director of

[footnote continued to next page]

are granted undue discrection, allowing arbitrary action, in the grading process. No specific facts are given to support this allegation. On the other hand, the depositions of the examiners clearly demonstrate to the Court that the examination papers are fairly and carefully graded. Each bar examiner grades all the applicants on each essay question which he has devised. The depositions show that each examiner looks for the minimal competence which in his judgment is a prerequisite to practice law. Further, the effect of any unconscious error in grading is greatly alleviated by the fact that several examiners independently grade the essay portion of the test which accounts for fifty percent of the total examination. Although the final decision to certify an applicant is a matter of judgment, no facts are before the Court to indicate that the judgment is not exercised fairly and consistently.

III. INHERENT DISCRIMINATION

The plaintiffs' next contention is that the bar examination, as presently devised, inherently discriminates against black applicants. In this regard, the facts are undisputed that a greater percentage of black applicants fail the examination than their white counterparts.

[footnote continued from preceding page]

testing for the National Conference of Bar Examiners testified by deposition that it would be impossible for a state board of examiners to know where to set the passing level to intentionally achieve this result.

On the February, 1973 examination, 59 percent of all black applicants failed the test while only 34 percent of white applicants failed. On the July, 1973 exam, 55 percent of the black and 23 percent of the white applicants failed the examination. Similar disparities exist between the black and white applicants for prior examinations.

All facts relating to the preparation of the Georgia bar examination have been set forth in the depositions of the examiners (as to the essay portion). The method of grading and the methods by which the cutoff score is determined have been explained at length. The record presents no material disputed facts. All that remains is for the Court to determine, as a matter of law, (1) whether the examination has a rational relationship to an applicant's fitness to practice law; and (2) whether any person has been excluded on the basis of impermissible criteria. It is not this court's function to pass independently on the qualifications of applicants.

The attack upon the present examination system focuses on the fact that a greater percentage of blacks, than whites, fail the examination, thus its form and content is inherently discriminatory and must be justified. In this regard, it was made clear in Schware v. Board of Examiners, 353 U.S. 232 (1957), that a state may establish high standards for admission to the bar. Likewise, the Courts have uniformly held that a state may require that applicants meet certain prerequisites "which have a rational connection with the applicant's fitness or capacity to practice law." Id. at 239.

The fact that a policy of high admission standards falls somewhat disproportionately upon blacks does not itself constitute a violation of the fourteenth amendment, unless the standards are shown to be arbitrary or applied differently to blacks.

Plaintiffs argue that since a disproportionate number of black applicants are unsuccessful in passing the bar examination, a presumption of discrimination exists, which presumption is binding until defendants offer a legal explanation. An analogy is urged in the effect given racial disparity in job qualifications. In the area of employment examinations, once de facto discrimination is shown, the Courts place the burden on the employer to prove that an examination is job related. See Griggs v. Duke Powere Co., 401 U.S. 424 (1971). Without adopting such a test as applicable to equal protection analysis, this Court fails to find evidence before the Court to support a factual issue that the Georgia bar examination does not have a reasonable relationship with the practice of law. On the contrary, defendants have clearly shown that such a relationship does exist. An examination made up, at least in part, of hypothetical essay questions is the recognized method by which to determine whether to admit candidates to the bar. Defendants demonstrate that the factors looked for in the answers to the essay questions test the applicant's ability to apply basic legal principles to hypothetical fact situations. This type of exam has a rational relationship to an applicant's fitness to practice law, satisfying the traditional standard set down in Schware.

Other courts have also found this relationship to exist. In Chaney v. State Bar of California, 386 F.2d 962 (9th Cir. 1967), similar arguments were made challenging a hypothetical essay type examination. The Court stated:

> [I]t seems patent on its face that California has the right to . . . use such a type of examination in demonstration by those seeking admission to its Bar, as a qualification standard, that they have the capacity to analyze general legal situations and to make application thereto of such general legal knowledge as can be expected to be possessed by the graduates of accredited law schools. The existence of this qualification certainly has a rational connection with the capacity to practice law, for it inherently is the primary basis of general legal service. And of course there also is involved in such an essay examination an indication as to the possession or lack of knowledge in the legal fields to which the questions relate.

Id. at 964. A perusal of both the essay and multi-state objective questions used on past examinations further convinces the Court of the strong relationship. Both require an exercise of the analytical and reasoning capacity of the applicant--necessary requirements for the practice of law. Accordingly, summary judgment on the

issue of inherent discrimination is granted in favor of the defendants.

IV. DENIAL OF DUE PROCESS

Plaintiffs also contend that because there is no ascertainable standard with which they can compare their performance on the bar examination and no right of administrative review they have been denied their right to pursue their chosen profession without due process of law. It is clear that no direct review of the grade received on the examination is provided for and the bar bar examiners refuse to reconsider a grade. No factual issue exists in this regard as it is merely a question of law whether due process has been denied in this procedure.

Bar examinations clearly do not lend themselves to a review process. Allowance of such would certainly result in shifting and diverse standards. With a recognition of this fact, provision has been made in Georgia for the reexamination of the failing applicant at the next regularly scheduled examination. This Court finds that the purpose of a hearing is better served by a reexamination of the failing applicants. Likewise, such a reexamination also affords the protections provided by a hearing.

Accordingly, summary judgment is granted in favor of the defendants in each case.

IT IS SO ORDERED this 27th day of June, 1974.

s/William C. O'Kelley
William C. O'Kelley
United States District
Judge

[Filed Sep. 27, 1973]
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES E.C. PERRY, et al.]
]Civil Action
vs.] No. 17688
]
EDWARD S. SELL, JR., et al.]

O R D E R

This is an action for declaratory and injunctive relief against members of the Georgia State Board of Bar Examiners and certain other public officials alleging racial discrimination in the admission of black applicants to the Georgia Bar. The plaintiffs have brought this action as a class action under Rule 23 of the Federal Rules of Civil Procedure. Presently before the Court is the question of the scope of the class to be represented by the named plaintiffs.

The complaint requests relief on behalf of the named plaintiffs and all other black law school graduates who have failed the Georgia bar examination and those black law school graduates who will take the examination in the future. This proposed class would include black applicants who have failed the Georgia bar examination at one time, but who have subsequently passed the exam. This Court feels that the class as so defined is too broad, since some of its members are now admitted to practice law in Georgia.

Accordingly, the Court defines the class to be represented by the named plaintiffs in this case as follows: Those black law school graduates who have taken and failed the Georgia bar examination and have not subsequently passed the examination or have not otherwise been admitted to practice law in Georgia. Also included are those black law school graduates who will take the Georgia bar examination in the future.

IT IS SO ORDERED this 27th day of September, 1973.

s/William C. O'Kelley
William C. O'Kelley
United States District
Judge

[Filed Aug. 14, 1972]
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EUGENE WILSON TYLER	]	
	]	CIVIL ACTION
VS.	]	
	]	NO. 15866
TRAMMELL VICKERY, ET AL.	]	

O R D E R

Plaintiff has filed this civil suit against the individual members of the State Board of Bar Examiners charging that defendants in their practices and procedures, in particular their devising of examinations and the grading thereof, have discriminated against blacks and against the plaintiff, a black man, on the basis of race. The cause of action is predicated on 42 U.S.C. §§1981 and 1983 and the Fourteenth Amendment. The jurisdiction of this court is invoked under 28 U.S.C. §1343. The action has been submitted on defendants' motion for summary judgment. Defendants argue that there is no genuine question of fact as to any material issue and that therefore judgment should issue for the defendants. In considering this motion the court will examine each of the issues presented in order to determine that [sic], if any, issues, will require a trial for resolution.

I - ARBITRARY AND HYPOTHETICAL QUESTIONS

Plaintiff alleges that the questions asked on the State Bar Examination were arbitrary, hypothetical, and without foundation in law or equity. It is argued that these questions, because of their arbitrary and hypothetical nature, have no correct answer, and that thus the grading thereof is arbitrary and according only to the whim of the respondents. Plaintiff asserts that the grading thereof is based upon the examiners' like or dislike of the reasoning or the manner in which the answer is given. Plaintiff claims that the type of questions and the arbitrary grading methods abridge his privileges and immunities, deny him equal protection of the laws and deprive him of due process of the law.

It is the opinion of this court that the attack upon the hypothetical nature of the questions cannot be sustained. The defendants do not contest plaintiff's contentions that the questions are essay-type and hypothetical and, indeed, have submitted as evidence copies of the examination which plaintiff failed to pass. The abstract nature of the questions is, however, fully justified by law.

The leading case in the area of the qualifications which a state can permissibly impose upon applicants to the bar is Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

> A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protections Clause of the Fourteenth Amendment. A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.
> 353 U.S. at 239 (emphasis added; citations omitted).

The relevant question must then be whether the passing of an examination made up of subjective, essay-type questions has a rational connection with the applicant's ability to practice law in the State of Georgia. It is beyond question that it does. While plaintiff would apparently favor a more objective type of examination/[1], most of an attorney's actual work once admitted into practice involves the analysis of complicated fact situations and the application thereto of abstract legal principles. Both in legal practice and with these essay-type questions, recognition of the legal problem

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/[1] In this regard it is interesting to note that as of the February, 1972, bar examination, a large part of the examination is now made up of objective, multi-choice type questions which are compiled by the National Testing Service and employed by numerous states as part of their bar examinations.

presented and well-reasoned explication of the relevant considerations is of utmost importance.

A careful look at the examination questions themselves leads the court to conclude that, contrary to plaintiff's assertions, the questions are based in law and in equity. Supportive of the State of Georgia's decision to employ essay-type questions is the American Bar Association's "Code of Recommended Standards for Bar Examiners," which states that "The major portion of the bar examination should consist of questions in a form of hypothetical fact problems requiring essay answers." It is clear then, that the use of essay questions in Georgia Bar Examination is rationally connected to an applicant's fitness to practice law. Chaney v. State Bar, 386 F.2d 962 (9th Cir. 1967).

Plaintiff mounts a further attack upon the essay-type questions in his charge that such questions permit arbitrary and subjective grading which is dependent upon the whim of the examiner and upon the particular examiner which happens to grade the paper, without regard to correctness of the answer. If the grading were done in a wholly arbitrary manner, it would be a violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment. Schware v. Board of Bar Examiners, supra.

On a motion for summary judgment, the burden is on the moving party to establish that there is no question of fact as to any material issue. On the issue of the grading of the examinations,

the defendants have presented no evidence to establish that the grading is not arbitrary or that respondents exercise caution to insure that the grading is as fair and uniform as possible. With no evidence on this issue, the court cannot rule that respondents have carried the burden of showing that they are entitled to judgment as a matter of law on this issue. Accordingly, the court holds that the motion for summary judgment must be denied on the question of the arbitrariness of the grading of the examinations.

II - STATISTICS SHOWING SMALL PERCENTAGE OF BLACK ATTORNEYS PASSING THE BAR EXAMINATION

Plaintiff asserts that the bar examination discriminates against black applicants. He alleges that while sixty per cent of the white applicants passed the June, 1971, bar examination, only fifteen per cent (15%) of the black applicants were successful on the examination. Further, plaintiff alleges that of the approximately 4,500 attorneys in Georgia, only 1 1/2% thereof are black. It is plaintiff's argument that these statistics show racial discrimination in violation of 42 U.S.C. §1981.

As is made clear in Schware, the State of Georgia is free to establish high standards for admission to the bar. The fact that the high admission standards may fall disproportionately upon blacks does not constitute violation of §1981 or of the Fourteenth Amendment, unless such standards are arbitrary or are applied more strictly to blacks than to other

applicants. The statistics, while they may of course be introduced into evidence on the issue of racially discriminatory grading, do not of themselves establish a prima facie case of violation of §1981 or the Fourteenth Amendment.

III - THE LACK OF BLACK BAR EXAMINERS

Plaintiff alleges that there has never been a black member of the Board of Bar Examiners and that such fact constitutes racial discrimination per se.

The analysis of this allegation is analogous to the court's treatment of the issue of statistics. The fact, if proved, that there are no black bar examiners does not, of itself, establish that there has been arbitrary and racially discriminatory treatment of applicants to the bar. An all-white Board of Bar Examiners does not constitute a per se violation of §1981 or of the Fourteenth Amendment. It is true, however, that proof of such allegation might have some relevance to the question whether the bar examiners have been arbitrary and racially discriminatory in the grading of examinations.

IV - DENIAL OF RIGHT TO PRACTICE IN FEDERAL COURT

Plaintiff alleges that the right to practice in federal court is dependent upon a license to practice in state court, and that therefore the actions of the defendants arbitrarily deprive him of a federal privilege, in violation of the Fourteenth Amendment.

However, although state bar admissions are entitled to respect from the federal courts, In Re Isserman, 345 U.S. 286 (1953), they are not conclusively binding on the federal courts. In Re Ruffalo, 390 U.S. 544 (1968). The federal judiciary is just as autonomous as the state courts where admission to its own bar is concerned. See Theard v. United States, 354 U.S. 278 (1957).

Defendants are thus not responsible for plaintiff's not being admitted to practice in federal district court. The Local Rules of the United States District Court for the Northern District of Georgia, Rule 1, stating that any person who is a member of the bar of the State of Georgia shall be eligible for admission to practice in the federal court has been adopted and enforced by this court, not by defendants. Summary judgment must therefore be granted to defendants on this issue.

V - KNOWLEDGE BY EXAMINERS OF NAMES OF EXAMINEES

Plaintiff alleges that the bar examiners have access to the names and numbers of all applicants during the grading of the examinations. Defendants have submitted evidence which tends to refute this allegation.

An affidavit from Ben Estes, Administrative Assistant to State Board of Bar Examiners, sets forth in detail the precautions which are followed to insure the secrecy of the identity of the examinees. The examinations are marked only with the examination number, not the

name, of the applicant. The examination numbers are drawn by the applicants on the first day of the examination. Each examinee then fills out a form with his name, address and circuit and places the form in the envelope which has his number on it. These envelopes are boxed and taken to the State Treasurer's office where they are locked in a vault until the grading is complete. This evidence, if not contradicted, would indicate that bar examiners are not aware of the names of the applicants whose papers they are grading. Plaintiff has filed no brief and no evidence to contradict this affidavit.

Rule 56, Fed.R.Civ.P., provides that if the moving party supports its motion for summary judgment by evidence, the party opposing the motion must then set forth specific facts showing that there is a genuine issue of fact for trial. As the evidence presented by the defendants on the question of the examiner's knowledge of the examinees' names and numbers has not been contradicted by the plaintiff, summary judgment for the defendants is proper on this issue and is hereby granted.

VI - ALLEGATION THAT MANY BLACKS DO NOT TAKE THE EXAMINATION

Plaintiff alleges that many blacks do not take the bar examination because of the high discriminatory action of the defendants. Plaintiff, as he has taken the bar examination, does not have standing to raise this issue.

Accordingly, the motion for summary

judgment is DENIED on the issue of the allegedly arbitrary and racially discriminatory grading of the bar examinations. On all other issues presented by the complaint, the motion for summary judgment is GRANTED.

IT IS SO ORDERED.

This, the 11th day of August, 1972.

s/Richard C. Freeman
RICHARD C. FREEMAN,
UNITED STATES DISTRICT JUDGE

[Filed Aug. 14, 1972]
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RALPH BANKS, JR.	]	
	]	CIVIL ACTION
vs.	]	
	]	NO. 15867
HENRY J. MILLER, ET AL.	]	

O R D E R

Plaintiff has filed this civil suit against the individual members of the State Board of Bar Examiners charging that defendants in their practices and procedures, in particular their devising of examinations and the grading thereof, have discriminated against blacks and against the plaintiff, a black man, on the basis of race. The cause of action is predicated on 42 U.S.C. §1983 and the Fourteenth Amendment. The jurisdiction of this court is invoked under 28 U.S.C. §1343. The action has been submitted on defendants' motion for summary judgment. Defendants argue that there is no genuine question of fact as to any material issue and that therefore judgment should issue for the defendants. In considering this motion the court will examine each of the issues presented in order to determine what, if any, issues will require a trial for resolution.

I - ARBITRARY AND HYPOTHETICAL QUESTIONS

Plaintiff alleges that the questions

asked on the State Bar Examination were arbitrary, hypothetical, and without foundation in law or equity. It is argued that these questions, because of their arbitrary and hypothetical nature, have no correct answer, and that thus the grading thereof is arbitrary and according only to the whim of the respondents. Plaintiff asserts that the grading thereof is subjective and is influenced by the defendants' recognition of and prejudice against the examination papers of black applicants.

It is the opinion of this court that the attack upon the hypothetical nature of the questions cannot be sustained. The defendants do not contest plaintiff's contentions that the questions are essay-type and hypothetical and, indeed, have submitted as evidence copies of the examination which plaintiff failed to pass. The form and nature of the questions, however, is fully justified by law.

The leading case in the area of the qualifications which a state can permissibly impose upon applicants to the bar is Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

> A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protections Clause of the Fourteenth Amendment. A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits

> an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.
> 353 U.S. at 239 (emphasis added; citations omitted).

The relevant question must then be whether the passing of an examination made up of subjective, essay-type questions has a rational connection with the applicant's ability to practice law in the State of Georgia. It is beyond question that it does. While plaintiff would apprently favor a more objective type of examination/[1], much of an attorney's actual work once admitted into practice involves the analysis of complicated fact situations and the application thereto of abstract legal principles. Both in legal practice and with these essay-type questions, recognition of the legal problem presented and well-reasoned explication of the relevant considerations is of utmost impor-

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1/ In this regard it is interesting to note that as of the February, 1972, bar examination, a large part of the examination is now made up of objective, multi-choice type questions which are compiled by the National Testing Service and employed as part of the bar examinations of numerous states.

tance.

A careful look at the examination questions themselves leads the court to conclude that contrary to plaintiff's assertions, the questions are based in law although often stated in terms of a hypothetical fact situation. Supportive of the State of Georgia's decision to employ essay-type questions is the American Bar Association's "Code of Recommended Standards for Bar Examiners," which states that "The major portion of the bar examination should consist of questions in a form of hypothetical fact problems requiring essay answers." It is clear then, that the use of essay questions in Georgia Bar Examination is rationally connected to an applicant's fitness to practice law. Chaney v. State Bar, 386 F.2d 962 (9th Cir. 1967).

Plaintiff mounts a further attack upon the essay-type questions in his charge that in grading such questions, the bar examiners are able to recognize and discriminate against the papers of black applicants. Plaintiff asserts that black people have a unique means of expression which, while educationally and legally correct, is nonetheless distinguishable. It is alleged that the defendants can recognize those papers and discriminate against them on the basis of race. It is clear that if plaintiff's allegations can be proved to be true, such arbitrary and discriminatory grading would be a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Schware v. Board of Bar Examiners, supra.

On a motion for summary judgment, the burden is on the moving party to establish that there is no question of fact as to any material issue. On the issue of the grading of the examinations, the defendants have presented no evidence to establish that the grading is not arbitrary or that respondents exercise caution to insure that the grading is as fair and uniform as possible. Neither have defendants submitted any evidence which would tend to show that they are unable to recognize the papers of black applicants. With no evidence on this issue, the court cannot rule that respondents have carried the burden of showing that they are entitled to judgment as a matter of law on this issue. Accordingly, the court holds that the motion for summary judgment must be denied on the question of the allegedly arbitrary and discriminatory grading of the examinations.

II - STATISTICAL SHOWING SMALL PERCENTAGE OF BLACK ATTORNEYS PASSING THE BAR EXAMINATION

Plaintiff asserts that the bar examination discriminates against black applicants. He alleges that while fifty (50%) per cent of the white applicants passed the June, 1971, bar examination, only ten per cent (10%) of the black applicants were successful on the examination. Further, plaintiff alleges that of the approximately 4,500 attorneys in Georgia, only 1 1/2% thereof are black. It is plaintiff's argument that these statistics show racial discrimination in violation of 42 U.S.C. §1981.

As is made clear in Schware, the State of Georgia is free to establish high standards for admission to the bar. The fact that the high admission standards may fall disproportionately upon blacks does not constitute violation of §1981 or of the Fourteenth Amendment, unless such standards are arbitrary or are applied more strictly to blacks than other applicants. The statistics, while they may of course be introduced into evidence on the issue of racially discriminatory grading, do not of themselves establish a prima facie case of violation of §1981 or the Fourteenth Amendment.

III - THE LACK OF BLACK BAR EXAMINERS

Plaintiff alleges that there has never been a black member of the Board of Bar Examiners and that such fact constitutes racial discrimination per se.

The analysis of this allegation is analogous to the court's treatment of the issue of statistics. The fact, if proved, that there are no black bar examiners does not, of itself, establish that there has been arbitrary and racially discriminatory treatment of applicants to the bar. An all-white Board of Bar Examiners does not constitute a per se violation of §1981 or of the Fourteenth Amendment. It is true, however, that proof of such allegation might have some relevance to the question whether the bar examiners have been arbitrary and racially discriminatory in the grading of examinations.

IV - DENIAL OF RIGHT TO PRACTICE IN FEDERAL COURT

Plaintiff alleges that the right to practice in federal court is dependent upon a license to practice in state court, and that therefore the actions of the defendants arbitrarily deprive him of a federal privilege, in violation of the Fourteenth Amendment.

Although state bar admissions are entitled to respect from the federal courts, In Re Isserman, 345 U.S. 286 (1953), they are not conclusively binding on the federal courts. In Re Ruffalo, 390 U.S. 544 (1968). The federal judiciary is just as autonomous as the state courts where admission to its own bar is concerned. See Theard v. United States, 354 U.S. 278 (1957).

Defendants are thus not responsible for plaintiffs' not being admitted to practice in federal district . The Local Rules of the United States District Court for the Northern District of Georgia, Rule 1, stating that any person who is a member of the bar of the State of Georgia shall be eligible for admission to practice in the federal court, has been adopted and enforced by this court, not by defendants. Summary judgment must therefore be granted to defendants on this issue.

V - KNOWLEDGE BY EXAMINERS OF NAMES OF EXAMINEES

Plaintiff alleges that the bar examiners

have access to the names and numbers of all applicants during the grading of the examinations. Defendants have submitted evidence which tends to refute this allegation.

An affidavit from Ben Estes, Administrative Assistant to State Board of Bar Examiners, set forth in detail the precautions which are followed to insure the secrecy of the identity of the examinees. The examinations are marked only with the examination number, not the name, of the applicant. The examination numbers are drawn by the applicants on the first day of the examination. Each examinee then fills out a form with his name, address and circuit and places the form in the envelope which has his number on it. These envelopes are boxed and taken to the State Treasurer's office where they are locked in a vault until the grading is complete. This evidence, if not contradicted, would indicate that bar examiners are not aware of the names of the applicatns whose papers they are grading. Plaintiff has filed no brief and no evidence to contradict this affidavit.

Rule 56, Fed. R. Civ. P., provides that if the moving party supports its motion for summary judgment by evidence, the party opposing the motion must then set forth specific facts showing that there is a genuine issue of fact for trial. As the evidence presented by the defendants on the question of the examiner's knowledge of the examinees' names and numbers has not been contradicted by the plaintiff, summary judgment for the defendants is proper on this issue and is hereby granted.

VI - ALLEGATION THAT MANY BLACKS DO NOT TAKE EXAMINATION

Plaintiff alleges that many blacks do not take the bar examination because of the highly discriminatory action of the defendants. Plaintiff, as he has taken the bar examination, does not having standing to raise this issue.

VII - LACK OF OFFICIAL NOTIFICATION AND HEARING

Plaintiff alleges that he was not given official notification of his failure to pass the January, 1970, bar examination and learned of such failure only through the newspapers. Plaintiff has no standing to raise this issue, as further statements in the complaint establish that he was officially informed of his failure of the examination by defendant Miller.

Plaintiff asserts that he requested his grade and a hearing from defendant Miller and was refused. In McMichen v. State Board of Bar Examiners, 305 F. Supp. 1221 (N.D. Ga. 1969), a three-judge panel of this court held that no substantial federal question was presented by the allegation of denial of an appeal from an adverse decision by the Board of Bar Examiners. That case is dispositive of plaintiff's claim of right to a hearing. As the court held in McMichen, plaintiff had the right under Georgia law to proceed by mandamus to challenge the legality of the defendants' refusal to certify him for admission to the bar. Plaintiff thus

could have had a hearing in court on his failure of the examination. As to defendants' refusal to inform plaintiff of the exact numerical grade which he received on the examination, the court finds no denial of the Fourteenth Amendment in that regard.

Accordingly, the motion for summary judgment is DENIED on the issue of the allegedly arbitrary and racially discriminatory grading of the examinations. In all other respects and as to all other issues presented by the complaint, the motion for summary judgment is GRANTED.

IT IS SO ORDERED.

This, the 11 day of August, 1972.

s/Richard C. Freeman
RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE